TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1928

[redacted] 200

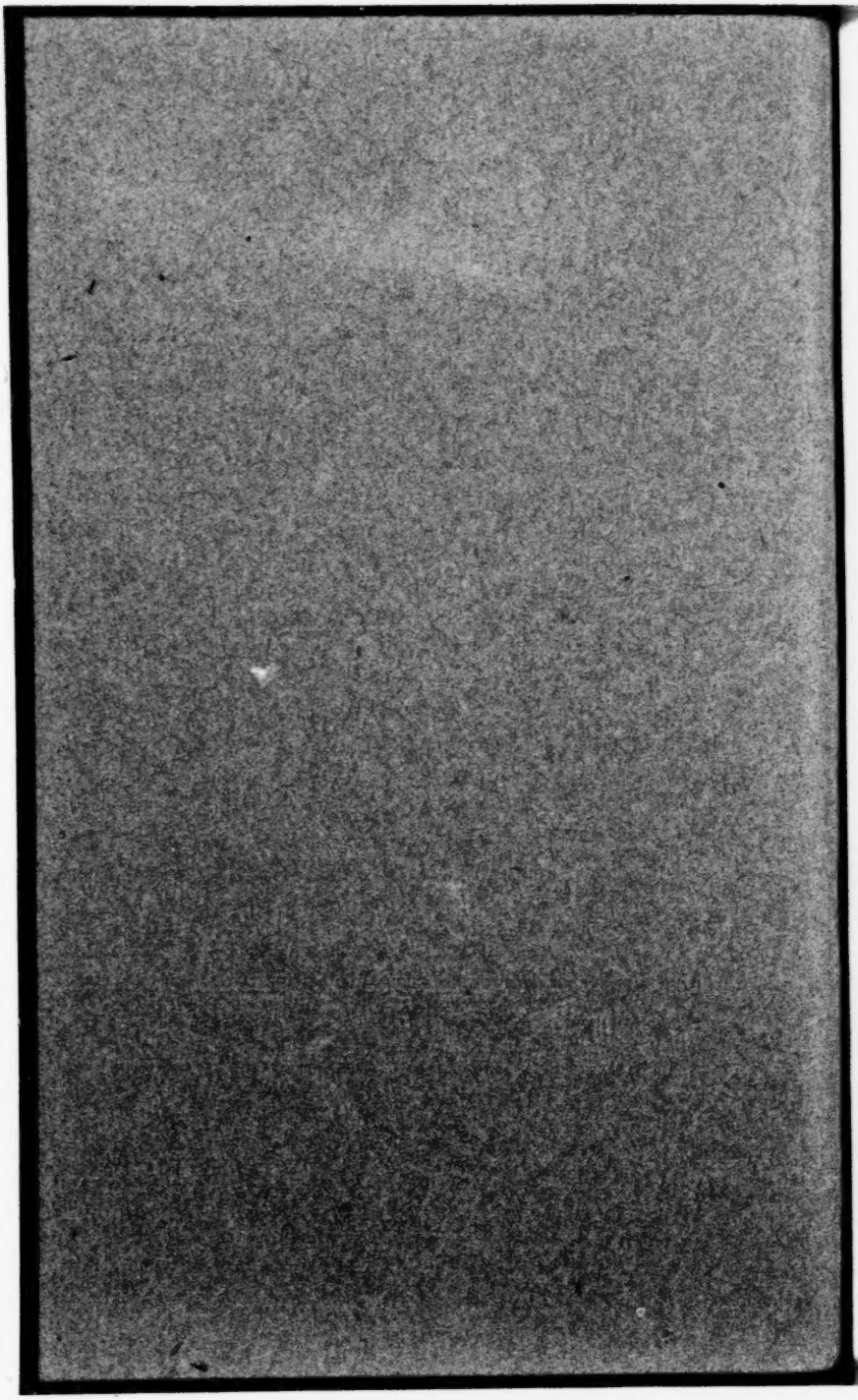
JESSE MOORE, PRESIDENT OF THE ODD-LOT COTTON EXCHANGE OF NEW YORK, APPELLANT,

vs.

THE NEW YORK COTTON EXCHANGE, THE WESTERN UNION TELEGRAPH CO., AND THE GOLD & STOCK TELEGRAPH CO.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

[redacted]



(30,686)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 721

FRANK MOORE, PRESIDENT OF THE ODD-LOT COTTON EXCHANGE OF NEW YORK, APPELLANT,

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[fol. 1] CAPTION—Omitted

[fol. 2] **IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK**

FRANK MOORE, President of Odd Lot Cotton Exchange of New York, Complainant,

against

THE NEW YORK COTTON EXCHANGE, THE WESTERN UNION TELEGRAPH Company, and The Gold and Stock Telegraph Company, Defendants

AMENDED BILL OF COMPLAINT

To the Honorable Justices of the United States District Court, Southern District of New York:

Frank Moore as President of the Odd-Lot Cotton Exchange of New York brings this his amended bill of complaint against the above named defendants, and for his cause of action plaintiff states:

First. The Odd-Lot Cotton Exchange, for whose benefit and the members thereof this action is brought, is an unincorporated general association of seven or more persons authorized, organized and operating under and by virtue of the laws of the State of New York, which also provide that suits may be brought in behalf of said association and its members by its President. That the main office [fol. 3] and place of business of said association is the City, County and State of New York, and within the Southern District of New York.

Second. That your orator likewise is a resident of the County and State of New York, in the Southern District.

Third. That the defendant New York Cotton Exchange is a membership corporation created by special legislative enactment of the State of New York, with power to sue and be sued, and consists of a membership of more than four hundred, with general office in the City, County and State of New York, and in the Southern District of New York.

Fourth. That the Western Union Telegraph Company is a public service corporation engaged in Interstate Commerce by transmitting messages for the public by means of telegraph and cable wires among and between the various states of the United States, and among and between the States and Territories of the United States, and among and between the States and Territories of the United States and Foreign countries, and the District of Columbia. That said Western Union Telegraph Company is chartered and organized by and under the laws of the State of New York, with its principal office in the City, County and State of New York, and within the Southern District of New York.

Fifth. That the Gold and Stock Telegraph Company is a corporation chartered and organized by and under the laws of the State of New York, with its principal office likewise in the City, County and [fol. 4] State of New York, and within the Southern District of New York. That at all the times hereinafter alleged said company was and is engaged in the business of publishing, circulating and disseminating market news and the continuous and instant quotations of cotton prices by means of ticker service located in Exchanges, Brokerage houses, with cotton dealers, and elsewhere throughout the United States and Territories, and the District of Columbia, and is and was at the times hereinafter alleged engaged in Interstate Commerce by the dissemination for hire of said news and cotton price quotations between the various States of the United States, and among and between the various States and Territories of the United States, and among and between the various States and Territories, and The District of Columbia.

Sixth. That this action is brought for violation of the Anti-Trust Laws of the United States, and the Court has jurisdiction over all the parties as herein alleged and shown.

Seventh. That the amount in controversy and involved in this action exceeds the sum of Three Thousand Dollars, exclusive of costs.

Eighth. The objects and purposes of the Odd-Lot Cotton Exchange of New York at the time of its organization were and now are: "To organize and maintain an exchange in the City of New York for the purchase, sale and exchange of Cotton and to provide for the transactions of brokers and dealers in said commodity; to generally promote the Cotton Trade in New York and throughout the Cotton [fol. 5] States; to increase the amount thereof, and to facilitate dealings and transactions in said commodity; to diffuse information as to prices, quotations, and such other matters as may relate to the trade and business of dealing in said commodity."

Ninth. That the members associated together and constituting said Odd-Lot Cotton Exhange of New York, some One Hundred in number, maintain an Exchange in the City of New York wherein they buy and sell cotton for future delivery without limit as to quantity, except that no lot bought or sold shall be less than ten (10) bales.

Tenth. That the members of the defendant, New York Cotton Exchange, are in the same business as the members of the Odd-Lot Cotton Exchange of New York, and are likewise unlimited as to the quantity of cotton dealt in, except that no lot shall be less than one hundred (100) bales.

Eleventh. That the contracts made by and between members of the Odd-Lot Cotton Exchange of New York have been and are chiefly for customers consisting of producers of cotton, merchants, brokers, factors, commission men, and others, located, resident and in business in other states than the State of New York, and chiefly

in the great cotton producing states of the South, to-wit: North Carolina, South Carolina, Georgia, Alabama, Mississippi, Louisiana, Texas, Arkansas and Oklahoma.

Twelfth. That said contracts of purchase and sale made and executed by said parties resident in said last enumerated States, by and through the members of the Odd-Lot Cotton Exchange of New [fol. 6] York, have been and are now made upon orders transmitted by the defendant, The Western Union Telegraph Company, by wire, and all reports concerning and confirmations of such purchases and sales by said members are likewise transmitted by the Western Union Telegraph Company.

Thirteenth. That said purchase and sale messages are among and between the different states enumerated in the Eleventh paragraph hereof, and among and between each and all said States and the State of New York, and are by and between purchasers and sellers of cotton, resident and engaged in business in said enumerated cotton producing states, and the State of New York.

Fourteenth. That the said contracts of purchases and sale of cotton of, by, for and between said residents of said cotton producing states, and other states, including the State of New York, are of and concerning and are in reference to and include actual deliveries made and to be made from said cotton growing states, to and into the State of New York, said deliveries being made by and for the sellers and to the purchasers of cotton produced and grown, and to be produced and grown in said cotton producing states.

Fifteenth. That said purchases and sales constitute a large and important part of the Interstate Commerce as between said cotton growing States and other states, including the State of New York. That in addition to the said interstate sales and purchase as alleged for delivery from said states, through and into many states of the United States, and into the State of New York, the said Interstate [fol. 7] Commerce involves the Interstate shipments and transportation of said commodity, through and from said cotton growing states, to the State of New York, whence it is consigned and shipped to other cotton markets of the United States and Foreign Countries for manufacture.

Sixteenth. That the Odd-Lot Cotton Exchange of New York, and the members thereof, provide a ready market for the sale and delivery of cotton in lots of less than One Hundred (100) bales, and not less than ten (10) bales.

Seventeenth. That fair and equal opportunity of the public, including farmers and growers of cotton, merchants, cotton factors, commission men, dealers in cotton, and others, requires that there be a ready market wherein quantities of less than One Hundred (100) bales may be bought or sold, and that without such a market, small growers of cotton and merchants, factors, commission men and all others possessing cotton in lots of less than One Hundred (100)

bales, or who will by some future month grow or have on hand for delivery such amounts, are denied a market and are excluded from equal opportunity to buy or sell at reigning prices from time to time for future delivery, and are thereby unfairly discriminated against and denied the equal right to take advantage of the future market prices from time to time to protect themselves against sudden rise or decline in prices, or to hedge or protect themselves on future sale and delivery of spot cotton bought and delivered, or upon which they may advance money.

[fol. 8] Eighteenth. That the exchange and market maintained by the Odd-Lot Cotton Exchange of New York is necessary, not only for the equal opportunities given purchasers and sellers of cotton in small quantities, but in order that those dealing in small lots of less than One Hundred (100) bales may be an element in and by their transactions contribute to the establishment of a fair price of cotton for future delivery, as well as the prevailing prices of spot cotton for instant delivery.

Nineteenth. That the number of persons, firms and corporations consisting of cotton growers, merchants, factors, commission men, and others, who find it necessary for their business purposes to deal in cotton for future delivery in lots of less than One Hundred (100) bales far outnumber those who find it desirable or necessary to deal in lots of One Hundred (100) bales and over. That great numbers of persons who desire and find it necessary to buy or sell cotton for future delivery do not require or desire the purchase or sale of as much as One Hundred (100) Bales, and in many instances, are financially unable to pay the required amount to margin a purchase or sale in a lot or lots of One Hundred (100) or more bales, and for this reason are excluded from the future market, unless an Exchange with continuous market quotations be maintained, wherein and upon which purchases and sales can be made in odd lots of less than One Hundred Bales.

Twentieth. That the Odd-Lot Cotton Exchange, and its members, opened an Exchange in the City of New York for the use of its members, on or about the first day of August, 1922, and have [fol. 9] operated it ever since said date. That upon said exchange the members thereof have conducted the business of buying and selling cotton for future delivery for customers resident in and in business, as set forth in Paragraph Eleventh hereof, and the said transactions constitute Interstate Commerce, as set forth in Paragraph Eleventh to Fifteenth, inclusive hereof. That most of said purchases and sales have been between and among people resident and in business in the cotton growing states hereinbefore enumerated, and among and between them and persons resident and in business in other states, including the State of New York, and said transactions have been and now are concerning and embrace the buying, selling, shipping and transportation of cotton among said cotton states, and from, into and through said states and into other states, including the State of New York, and that said Interstate

purchases in most instances embraced and covered cotton to be reshipped and re-transported from the State of New York to other States and foreign countries for manufacture.

Twenty-first. That in order to promptly and efficiently serve the said members of the Odd-Lot Cotton Exchange, and brokers dealing on said exchange, and the customers of said members and of said brokers, it is necessary and has been necessary since the beginning of operations by complainant, that it have what is known as a continuous ticker service owned and operated by defendants, The Western Union Telegraph Co. and the Gold & Stock Telegraph Co., and in order to procure same, complainant made applica- [fol. 10] tion, as is required by the said two companies for said continuous ticker service, said application being of date on or about the first of July, 1922, *and being the printed application required by defendants to be signed by all applicants for their continuous quotations as set forth in the contract between the New York Cotton Exchange and the Western Union Telegraph Company and your orator was then ready, able, willing and offered to pay whatever charges might be made and exacted therefor and to comply with all requirements of defendants, and is now ready, able and willing and offers to pay said charges, and to comply with all requirements of defendants.* That at the time of making said application for said service to the Manager of the Western Union Telegraph Co., and who is in charge of such applications, complainant's representative presenting said application was informed and advised that said application could not be granted, except upon the express consent of the New York Cotton Exchange. That since the making of said application, the said Western Union Telegraph Co. and the Gold & Stock Telegraph Co. have failed and refused to install a ticker for the use of complainant giving continuous cotton quotations, as called for in said application, and the New York Cotton Exchange has failed and refused to give its consent to the installation of said ticker service for continuous cotton quotations.

Twenty-second. That the defendant Gold Stock & Telegraph Co. [fol. 11] is a subsidiary of the defendant Western Union Telegraph Company, completely dominated and controlled by said Western Union Telegraph Company. That the officers and directors of each of said companies, as your orator is informed, are the same and identical.

Twenty-third. That the defendant, the New York Cotton Exchange, with the purpose of monopolizing, commerce in cotton, has entered into and now has a contract with the defendant, The Western Union Telegraph Company, by which the New York Cotton Exchange gives to the Western Union Telegraph Company for itself and the Gold & Stock Telegraph Company, the ownership and exclusive right to disseminate the said continuous cotton market quotations. That by the terms of said contract, the New York Cotton

*Matter appearing between stars is an amendment to the amended bill of complaint allowed by the Court with consent of defendants' solicitors at the argument of motions for injunctions.

Exchange reserves unto itself, the right and authority to choose and designate the persons, companies, corporations or exchanges to whom the said Western Union Telegraph Company, and the Gold & Stock Telegraph Company shall sell, disseminate and deliver the said continuous cotton quotations, and the Western Union Telegraph Company acting for itself, and the Gold & Stock Telegraph Company agrees by said contract not to give said ticker or said continuous quotations to anyone, except upon the agreement and consent of the New York Cotton Exchange.

Twenty-fourth. That the Odd-Lot Cotton Exchange of New York is not required by either of the defendants to comply with any terms or conditions entitling them to said ticker and said continuous cotton quotations, but the said service has been captiously, unreasonably [fol. 12] and with extreme discrimination, refused to the said Odd-Lot Cotton Exchange, and the members thereof, on equal terms with their competitors in said business and commerce. That the said refusal to furnish said service by the Western Union Telegraph Company, and the Gold & Stock Telegraph Company, is wholly on account of said contract with the New York Cotton Exchange, which forbids their so doing without its consent.

Twenty-fifth. That the defendant New York Cotton Exchange has a monopoly upon the receipt and dissemination of the cotton price quotations on the foreign markets of the world, and in the establishment and dissemination of cotton price quotations in the City of New York, and by these the quotations and prices of cotton, both spot and for future delivery, are influenced, guided and fixed in all the exchanges and markets of all the States of the United States. Your orator further alleges that cotton as a commodity is of great value, aggregating in the United States alone from Seven hundred Million Dollars to approximately a Billion Dollars in the raw state and in the course of Interstate Commerce and manufacture, and trade rise in value to many times that sum. That such commodity is sold, traded in and transported into and through the various states of the United States of America and to foreign countries. That large quantities of cotton are also grown in Egypt, India and other parts of the world and come in competition with the cotton grown in the United States particularly in the markets of the British Empire, the European Continent and the Oriental countries. That the trade, [fol. 13] commerce, and manufacture of cotton into articles of commerce has become so extensive that a fraction of a cent difference in the market value or price of such cotton represents large amounts of profit or loss, so that the commercial custom has reduced trading to prices fixed continuously during the business hours of the day; and that all trading and dealings in cotton both spot, that is to say, for immediate delivery, and future, or cotton to be delivered at some future date, are governed by quotations as hereinafter set out, made continuously during the trading day. That such custom of buying, selling, and trading in cotton upon continuous quotations has grown and developed by many years of custom and practice, so that such trading upon quotation controls the price of the raw product in the hands of the grower as well as in the hands of the

spinner or manufacturer. That the value of the cotton produced the world over is constantly controlled by the probable supply and the probable demand or consumption and this supply and demand is constantly changing. The supply, by area planted, changing weather conditions increasing or retarding its growth, and destruction by insects. So that the dealing, trading in, and transportation of cotton in the United States and foreign countries is controlled by the instrumentalities for gathering all information as to supply and demand and prices resulting therefrom on the markets where such trading and dealing is carried on. That the dealer in spot cotton relies on the current quotation as a basis of value for buying and selling for such immediate delivery and the spinner, manufacturer or consumer relies upon such quotation for his immediate deliveries [fol. 14] as well as future deliveries. That the spinners and manufacturers have become accustomed to and are required by reason of competitive conditions to make contracts for the purchase and delivery of their cotton for the probable amount required during the year's cotton season. That in making such contracts, they are compelled to rely upon the current quotations and while carrying such contracts, the price of such future delivery cotton may on any day greatly change by reason of the conditions before set out, which could not have been anticipated. That by reason of such changes, the purchaser of such cotton for future delivery must be kept informed of the quotations and the probable supply and demand as aforesaid, so that he may have a free market in which to make sale of cotton bought at excessive prices to avoid heavy damage and probably bankruptcy because of his inability to freely sell and buy as conditions may change.

That the defendant, The New York Cotton Exchange, has been for many years engaged in the business of gathering the information as to the actual and probable supply and demand for cotton the world over. That the information as to the Egyptian and Indian cotton production as well as the probable British, Continental European, and Oriental demand is generally concentrated by like system, in Liverpool, England, and the prices fixed in the cotton trade in the United States is in a large measure influenced by the continuous quotations of the Liverpool Exchange. And that the defendant, the New York Cotton Exchange has the exclusive control by an arrangement with the Liverpool exchanges of such continuous quotations and that by reason of such long continued practice, and contracts with foreign exchanges, the said defendant, the New York [fol. 15] Cotton Exchange has acquired a complete monopoly of such information and by reason thereof controls the price quotations, which is the chief instrumentality in the control and handling of trade, commerce in cotton between all the states of the United States and largely in foreign countries. That by reason of the control of such information it is enabled to continuously supply its own members with such information to the exclusion of all other dealers, traders in, or owners, or purchasers of cotton. That by reason of which information, and the exclusive advance information as to the prices on the Liverpool Exchange, the members of said New York Cotton Exchange are enabled to deal in, buy and

sell spot as well as future cotton and the prices at which such dealings are made continuously during the day become the official quotations of said New York Cotton Exchange and such quotations by reason of its combination with its members become the property of the said defendant, The New York Cotton Exchange. That the said defendant, the New York Cotton Exchange thereby obtain exclusive control of such quotations and is engaged in the business of selling such quotations.

That the trading in cotton has become by fixed custom and practice carried on continuously during the day on quotations disseminated as aforesaid and therefore the telegraph lines have become a necessary and substantially an exclusive-instrumentality for communicating to all of the states, such quotations and information as are given out by the said New York Cotton Exchange. That by reason of the control and ownership of such quotations by the said defendant, The New York Cotton Exchange can and does prohibit the defendant, the Western Union Telegraph Company and the Gold & [fol. 16] Stock Telegraph Company from communicating or delivering its said information and quotations to any person or corporation except such as may be designated by their said co-defendant, the New York Stock Exchange.

That by reason of the control of the said instrumentalities of commerce, the said defendant, the New York Cotton Exchange can and does influence and control all dealing, trading and commerce in cotton in the United States and to a large extent in foreign countries and therefore has thereby monopolized the cotton commerce in the United States, and that the free competitive flow of Interstate Commerce in such product is hampered, restrained and monopolized by the said defendants.

Twenty-sixth. That in the conducting of said Exchange and in the said transactions for the purchase and sale of cotton, the Odd-Lot Cotton Exchange of New York and its members are in direct and close competition with the defendant New York Cotton Exchange, its members and brokers operating thereon, and in close competition with the Cotton Exchange of the Cities of New Orleans, La., Memphis, Tenn., Houston, Texas, Atlanta, Augusta, and Savannah, Ga. That complainant is informed that the New York Cotton Exchange has consented that the last named Exchanges receive the continuous cotton quotations, and that pursuant thereto, the Western Union Telegraph Co. and the Gold & Stock Telegraph Co. furnishes to the said last named Exchanges the said continuous cotton quotations, thereby openly and purposely discriminating against the Odd-Lot Cotton Exchange of New York, and by said acts using and employing un- [fol. 17] fair and unlawful methods of competition in commerce in direct violation of the Acts of Congress.

Twenty-seventh. For further grounds of complaint, the complainant says that it is necessary to the business of the complainant and of its members, brokers executing orders on its Exchange, that from time to time, they execute orders with other brokers, including members of the New York Cotton Exchange. That in order to more com-

pletely monopolize the said business, and as constituting additional acts of discrimination and unfair methods of competition, complainant alleges that the said New York Cotton Exchange objects to and prohibits its members transacting business with the members of the Odd-Lot Cotton Exchange, and among other instances, and evidence thereof, complainant says, on January 3, 1923, certain members of the New York Cotton Exchange who were engaged in the transaction of business with members of the Odd-Lot Cotton Exchange involving the purchase and sale of cotton for future delivery were, by the official Supervisory Committee of the New York Cotton Exchange, advised and directed to discontinue their business transactions with members of the Odd-Lot Cotton Exchange.

Twenty-eighth. As a further instance of the said unlawful purposes on the part of the New York Cotton Exchange, it prohibits its members from imparting to the Odd-Lot Cotton Exchange, or any of its members, the prices or quotations prevailing upon the New York Cotton Exchange, and that the penalty for the violation of said rule is expulsion.

[fol. 18] Twenty-ninth. That all of the aforesaid unlawful acts and conduct on the part of the New York Cotton Exchange against the Odd-Lot Cotton Exchange of New York, were and are wholly unlawful, and your orator alleges the fact to be that the New York Cotton Exchange is a monopoly, having complete domination and control of the cotton market for the purchase and sale for future delivery, as hereinbefore alleged; that it has complete control over the receipt and dissemination of the market quotations from foreign markets, and of the establishment and dissemination of the quotations in the City of New York, and of the manner, and to whom, same may be disseminated from the City of New York and to other Exchanges in the United States.

Thirtieth. That the said contract hereinbefore alleged between the New York Cotton Exchange and the Western Union Telegraph Co. and the Gold & Stock Telegraph Co. is in restraint of trade and commerce among the several states, and was made and entered into pursuant to a conspiracy on the part of the New York Cotton Exchange and its members, constituting said exchange, in restraint of trade and commerce among the states.

Thirty-first. That the said contract between the New York Cotton Exchange and the said two telegraph companies, defendants, and the captious and unreasonable refusal to allow the Odd-Lot Cotton Exchange of New York to have installed, for the use of its members, a cotton ticker, together with the continuous cotton quotations, is an attempt on the part of said defendants, and particularly of the New York Cotton Exchange, and its members, to monopolize the trading [fol. 19] in cotton for future delivery in the City of New York, and to monopolize cotton quotations and the dissemination thereof.

Thirty-second. That the said contract between the New York Cotton Exchange and the Western Union Telegraph Company and the Gold & Stock Telegraph Company, and the refusal of the New York Cotton Exchange to allow the Odd-Lot Cotton Exchange of New York to install a cotton ticker, and have the continuous cotton quotations, while allowing same to its competitors as hereinbefore alleged, constitute an unfair method of competition in commerce contrary to the acts of Congress in such cases made and provided.

Thirty-third. That the said unlawful acts on the part of the defendants, and particularly on the part of the New York Cotton Exchange, as set forth in the foregoing paragraphs Twenty-third to Twenty-ninth inclusive, and the failure and refusal of the New York Cotton Exchange and its members to allow members of said Exchange to trade and deal with members of the Odd-Lot Cotton Exchange of New York, concerning the purchase and sale of cotton for future delivery, and the prohibition of its members imparting cotton quotations to members of the Odd-Lot Cotton Exchange of New York, are such and all for the express purpose and with the design of excluding from the business of purchasing and selling cotton for future delivery on any exchange in the City of New York, except the New York Cotton Exchange; and the said unlawful acts have the effect of restraining Interstate trade and commerce by the arbitrary use of the power possessed by the New York Cotton Exchange, [fol. 20] by reason of its monopoly, to crush and eliminate weaker competitors, including the Odd-Lot Cotton Exchange of New York. That the said unlawful acts have the effect of restraining the freedom of action in Interstate trade and commerce, and unduly suppress and restrain the play of competition in the conduct thereof.

Thirty-fourth. That the giving and granting to the competitors of the Odd-Lot Cotton Exchange of New York the privilege of installing a cotton ticker, and of receiving the continuous cotton quotations, while denying same to the Odd-Lot Cotton Exchange of New York, is an unlawful and unreasonable discrimination against the said exchange and constitutes an unfair method of competition in commerce.

Thirty-fifth. That each and all of said acts herein complained of on the part of the defendants are in open violation of the laws of the United States.

Thirty-sixth. That if the defendants be permitted to continue the said unlawful acts hereinbefore complained of, they will result in the complete destruction of the business of the Odd-Lot Cotton Exchange of New York, and of each and all of the members thereof.

Thirty-seventh. That it is not possible to calculate the financial injury which a continuation of said wrongs would inflict upon the Odd-Lot Cotton Exchange of New York, and its members, and for that reason there is no adequate remedy at law and it rests entirely [fol. 21] with the court of equity to grant injunctive relief to your

orator against a threatened loss and damage by the continued violation of the Anti-Trust laws.

Thirty-eighth. Your orator further alleges that the danger of irreparable loss and damage to the Odd-Lot Cotton Exchange, and the members thereof, is immediate.

In consideration whereof, and inasmuch as your orator has no sufficient remedy at law for the wrong done and threatened to be done, and inasmuch as the remedy at law will afford no protection to your orator, and those for whom he sues, against the wrong done and threatened to be done, as aforesaid, and inasmuch as the wrong done and threatened to be done to your orator, and those for whom he sues, is relievable only in a court of equity where matters of this kind are properly cognizable and reviewable, your orator, to the end that he may obtain the relief to which he is justly entitled in the premises, prays:

(1) A decree adjudging the New York Cotton Exchange to be a monopoly.

(2) That your Honors will grant unto your orator your decree cancelling and making null and void the contract or agreement entered into, and now existing, between the New York Cotton Exchange and the Western Union Telegraph Company and the Gold & Stock Telegraph Company, in reference to and concerning the installation of tickers and the giving and granting of continuous cotton quotations.

[fol. 22] (3) That the defendants, and each of them, and their officers, agents, attorneys and legal representatives, be perpetually restrained from carrying out the terms of said contract; that they be further restrained from refusing to install in the exchange of the Odd-Lot Cotton Exchange of New York a ticker for the purpose of receiving continuous cotton quotations, and from further refusing to give and disseminate to the Odd-Lot Cotton Exchange of New York, and its members, the continuous cotton quotations, the same as is furnished to and disseminated by the New York Cotton Exchange, through the said two telegraph companies, defendants, to other exchanges, individuals, corporations and brokers.

(4) That the New York Cotton Exchange, its agents, servants, officers, attorneys and legal representatives, be further enjoined from in any manner discriminating against the Odd-Lot Cotton Exchange of New York, or any of the members thereof, and that it be enjoined from instructing its members not to deal with the members of the Odd-Lot Cotton Exchange of New York, and from refusing to allow its said members to so deal, and from refusing to allow its members to furnish to the members of the Odd-Lot Cotton Exchange, with whom they deal, the cotton quotations, continuous and otherwise, as may be requested from time to time by the members of the Odd-Lot Cotton Exchange for their use in their transactions with members of the New York Cotton Exchange.

(5) That your orator may have such other and further relief, [fol. 23] preliminary and final, as to the Court may seem just and proper and which equity may require, and for costs.

John M. Coleman, Solicitor for Complainant.

Office & Post Office Address, 29 Broadway, Borough of Manhattan, New York City.

Jurat showing the foregoing was duly sworn to by James Eblin omitted in printing.

[fol. 24] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF MOTION FOR PRELIMINARY INJUNCTION

The above named defendants will please take notice that on the Amended Bill of Complaint herein, and the annexed affidavit of James Eblin, verified on the 26th day of January, 1923, the plaintiff will move this Court at a term thereof to be held for the hearing of motions at 10 o'clock A. M., on the 30th day of January, 1923, at the United States District Court Building, in the City of New York, or as soon thereafter as counsel can be heard, for an order granting the plaintiff a preliminary injunction, as prayed for in the amended bill of complaint.

Yours, etc., John M. Coleman, Solicitor for Complainant.

Office & P. O. Address, 29 Broadway, Borough of Manhattan, New York City.

[fol. 25] STATE OF NEW YORK,
County of New York ss:

James Eblin, being duly sworn, deposes and says that he is the Secretary of the Odd-Lot Cotton Exchange, in whose behalf the motion for a preliminary injunction hereto attached is made; that it is necessary that a preliminary injunction in said action be granted at once, as prayed for in the amended bill of complaint to continue in force pending and until the final determination of said action; That the danger of irreparable loss and damage as set forth in said amended bill of complaint is immediate.

James Eblin.

Sworn to before me this 26th day of January, 1923. Jessie N. Moller, Notary Public, Richmond Co. Cert. filed in N. Y. Co. 423. (Seal.)

[fol. 26] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER AND COUNTERCLAIM OF THE NEW YORK COTTON EXCHANGE

The New York Cotton Exchange, one of the defendants in the above entitled action, for answer to so much of the bill in the above entitled cause as this defendant is advised it is necessary for it to make answer unto says:

First. This defendant admits the First, Second, Third, Fourth, Fifth, Sixth and Seventh paragraphs of said bill.

Second. This defendant is informed and believes and, therefore, says that the objects and purposes of the said Odd-Lot Cotton Exchange were not and are not as stated in the Eighth paragraph of [fol. 27] the bill, and avers that its objects and purposes and business are as hereinafter, in paragraph Seventh of this answer, more fully stated.

Third. This defendant admits that there are about one hundred members of said Odd-Lot Cotton Exchange, and that they maintain an alleged exchange in the City of New York, but this defendant denies upon information and belief that the said members or any of them, either actually buy or sell in said Exchange cotton for future delivery in any quantities, or that said members are engaged in the same business as are the members of this defendant, except as to the quantities respectively dealt in.

Fourth. This defendant is informed and believes and alleges that the contracts made by members of said Odd-Lot Exchange are not chiefly, or at all, for producers of cotton, merchants, brokers, factors or commission men, as alleged in the Eleventh paragraph of the bill, but that the business of said members is as hereinafter more fully set forth in paragraph Seventh of this answer, and this defendant admits that the said members of said Odd-Lot Exchange do use the Western Union Telegraph Company for the transmission of their orders, reports and confirmations in the business conducted by them as hereinafter stated, and that the said telegraphic communications cross State lines.

Fifth. This defendant, upon information and belief, denies each and every allegation contained in the Fourteenth paragraph of said bill, and it further denies upon information and belief that any of the contracts referred to in said paragraph concern or include actual [fol. 28] deliveries made from cotton-growing States to and into the State of New York, or that the purchases and sales referred to in the Fifteenth paragraph of the Bill of Complaint constitute any part of interstate commerce between any of the States of the United States or between the United States and foreign countries, or that they involve interstate shipments or transportation of cotton between or

among the States of the United States or between any of the United States and foreign countries. This defendant alleges that the said Odd-Lot Exchange has promulagated, as one of its rules, the following:

"Rule V. Negotiable warehouse receipts of a responsible warehouse in the port of New York approved by the Board of Managers of the Exchange, accompanied by a list of weights of a weigher approved by the President, or Secretary of the Exchange, and certifying the merchantable condition of the bales, together with certificate of grade issued by the Secretary of the U. S. Department of Agriculture, shall constitute a good delivery in fulfillment of contracts for future delivery, and cotton so delivered shall be paid for by party taking delivery in cash or certified check against the documents.

In case of delivery of documents on the last delivery day of an expiring option, delivery of documents must be made by 11 A. M. of such day."

This defendant alleges that the said rule does not compel delivery of any cotton coming to New York from other States, and that, if [fol. 29] the contracts made on said Odd-Lot Exchange contemplate deliveries as prescribed by said rule, the trading on said Exchange and said contracts are not, and do not constitute, any part of interstate commerce. This defendant is further informed and believes and charges that no deliveries whatever are ever made in fulfillment of the contracts made between the members of said Odd-Lot Exchange or in said Exchange, as is more fully stated in paragraph Seventh of this answer.

Sixth. This defendant denies upon information and belief that the said Odd-Lot Exchange or the members thereof provide a ready market for the sale or delivery of cotton in lots of any size or that the public interest, or the interest of growers of cotton, or merchants, or cotton factors, or other dealers in cotton requires that there should be a ready market, wherein quantities of less than 100 bales may be bought or sold for future delivery, or that without such a market any growers of cotton or dealers therein are excluded from an equal opportunity to buy or sell in the open market, or that any such persons are unfairly discriminated against, or that an exchange, where contracts for the future delivery of cotton is less than 100 bale lots are made, is or will be resorted to by the owners of cotton for the purpose of protecting themselves against the fluctuations in prices of cotton, and alleges that such an exchange is or will be resorted to only by persons of small means and insufficient knowledge for the purpose only of gambling or making bets upon the fluctuations in cotton prices, and that this defendant denies that said Odd-Lot Exchange is necessary in order to afford equal opportunities to [fol. 30] purchasers and sellers of cotton in small quantities or that trading on said Odd-Lot Exchange would in any way contribute to the establishment of fair prices of cotton for present or future delivery; but that on the contrary the maintenance of the said Odd-Lot Exchange will only result in undue speculation by persons of

small means and inadequate knowledge and in the promotion of bucket shops throughout the country, and this defendant denies each and every allegation of paragraph Nineteenth of said bill.

Seventh. This defendant admits that the said Odd-Lot Exchange and its members opened a so-called Exchange in the City of New York on or about the 1st day of August, 1922, and have maintained such Exchange and have ever since operated and are now operating said Exchange, and this defendant is informed and believes and charges the fact to be that no contracts for immediate delivery or so-called "spot" transactions are entered into upon said Exchange or by its members, and that the entire business conducted by the said Exchange and by its members is a pretended buying and selling of cotton for future delivery in quantities of less than 100 bales and mostly of ten bales, and that no real trading, even in said small quantities, actually takes place on said Exchange; that the real purpose of said Exchange, and of its members in maintaining it is to creat- quotations, which its members may use in the conduct of bucket shops throughout the country, and that, while said Exchange pretends to maintain a clearing house where the transactions for future delivery of its members are concluded and cleared, said clearing house is a mere pretense, that the transactions of its members [fol. 31] are not cleared therein, and that the orders received by its members from their customers in such transactions are not carried to said Exchange for execution, but that all orders and transactions received by its members from their customers are made without the intention of either party thereto that said transactions should be completed by actual delivery of cotton and are completed by settlement in the offices of the said members without delivery and without being carried into actual transactions on said Exchange, and that thereby all of said transactions of all the members of said Exchange are purely transactions between each individual member on the one side and his customers upon the other, and that the business as so conducted is the business of a bucket shop as respects each of the members of said Exchange, and that the said Exchange is merely maintained as an aid to bucket shops and as a pretense for the purpose of concealing from the public officials and the customers of said members the fact that all said transactions violate the law of the State of New York which prohibits the maintenance of bucket shops.

Eighth. This defendant admits that in order that its mem'ers may carry on said business as aforesaid it is necessary that said Odd-Lot Exchange, or its members, should have the continuous quotations of this defendant, and that the said Odd-Lot Exchange did make application to the defendants, the Western Union Telegraph Company and the Gold and Stock Telegraph Company, for such quotations on or about the 1st day of July, 1922, and the said two companies have failed and refused to install a ticker for the purpose of providing the plaintiff with said quotations, and that this [fol. 32] defendant has refused to give its consent to the installation of said ticker service of said plaintiff, and that said Gold and Stock

Telegraph Company is a subsidary of the Western Union Telegraph Company and is controlled by the latter.

Ninth. This defendant further avers that the continuous quotations of this defendant given to said two Telegraph Companies and by them distributed as hereafter set forth, consist only of the prices made in the contracts entered into between members of this defendant in its Exchange Room during said market hours for the purchase and sale of cotton for future delivery, except that at the end of each day there is added to said quotations or prices for future delivery the prices in sales that day between members of this Exchange for cash or "spot" delivery, and that all said contracts for future delivery, as respects the terms of the delivery and kinds of property deliverable upon such contracts, are substantially the same now as they have been for the last fifteen years, and that the rule of said Exchange respecting the nature and kinds of deliveries to be made in performance of said contracts for future delivery has been the same for the last fifteen years and is as follows:

"Sec. 44. (a) Negotiable warehouse receipts as provided for in these By-Laws, signed by the Warehouseman, indorsed by the member in whose favor they are drawn (which endorsement must be witnessed), and accompanied by a certificate of grade issued by the Secretary of Agriculture or by a notice of grade, validated by the Secretary of Agriculture, shall be a good delivery in fulfillment of [fol. 33] contracts for future delivery, and shall be deemed a liquidation of the contract on which such delivery is made, and the member receiving the same shall return to the member making the delivery his transferable notice. No warehouse receipt shall be tendered which does not bear the stamp of the Inspection Bureau and the weight of the cotton. The delivery of cotton shall be considered complete when warehouse receipts and certificates or notice of grade as above provided shall have been delivered to the receiver."

and that during all of said time the rules of this defendant have prescribed the form of the contracts for future delivery, which its members should make in its Exchange Room, and said form of contract during all of said time has expressly provided that the cotton specified in each said contract should be "deliverable from licensed warehouse in the port of New York between the first and last days of" the delivery month specified in said contract, and that all said contracts for future delivery, out of which said quotations arise, are contracts made in the Exchange Room of this defendant in the City of New York between members of this defendant who are present in said Exchange Room at the time of making said contracts, and all parties to said contracts are required by said rules of this defendant to be members of the Exchange and the cotton deliverable upon said contracts must be represented by warehouse receipts issued by the licensed warehouses as above stated, and that each and every of said contracts is a transaction in intrastate commerce and not a transaction in interstate commerce, and the bill [fol. 34] herein seeks only to compel the defendants to deliver to the

plaintiff in the City of New York quotations which originate out of transactions in said City and do not in any way involve or require the transmission of quotations across state lines.

Tenth. This defendant denies that it has a monopoly upon the receipt or dissemination of quotations of cotton prices on any of the foreign markets of the world, or that it has any contracts with any of said foreign exchanges respecting the quotations of the prices made on said foreign exchange, nor has this defendant any contract with any cotton exchange in this country respecting the quotations of prices on such exchange or giving this defendant any control thereof; and this defendant further denies that the prices of cotton, either for spot or future delivery made upon the exchange of this defendant, fixes the prices of cotton in all other Exchanges or markets, and avers that such prices are fixed by the operation of the law of supply and demand, and that the said prices of cotton on the Exchange of this defendant is only a part of the information resorted to by buyers and sellers of cotton in the fixing of prices in their said transactions; and this defendant further denies that it can or does influence or control all dealings, trading and commerce in cotton in the United States, or to any extent in foreign countries, or that it has thereby monopolized cotton commerce of the United States, or that the free competitive trade in inter-state commerce in such products is either hampered, restrained or monopolized by this defendant or said [fol. 35] Western Union Telegraph Company or said Gold and Stock Telegraph Company.

Eleventh. This defendant further denies that the said Odd-Lot Cotton Exchange and its members are in direct or close competition with this defendant or its members, or with the cotton exchanges in either of the cities of New Orleans, La., Memphis, Tenn., Houston, Texas, Atlanta and Savannah, Ga., but this defendant admits that with its consent said telegraph companies are furnishing its said continuous quotations to each of the exchanges in said cities; but this defendant denies that it has sanctioned the giving of said quotations to said exchanges with the intent or for the purpose of discriminating against said Odd-Lot Cotton Exchange, or that it is thereby using or employing unfair competition in interstate commerce in violation of the Acts of Congress.

Twelfth. This defendant denies the allegations contained in the Twenty-seventh paragraph of the Bill of Complaint that it is necessary to the business of the complainant, or of its members, that, from time to time, they execute orders with members of the New York Cotton Exchange, and it further denies that this defendant prohibits its members from transacting business with the members of the Odd-Lot Cotton Exchange, or that on January 3rd, 1923, or at any other time, any members of the New York Cotton Exchange were by the Supervisory Committee of the New York Cotton Exchange, or by any other Committee thereof, advised, or directed, to discontinue business transactions with members of the Odd-Lot Cotton Exchange. And it further denies that it prohibits its mem-

[fol. 36] bers under penalty of expulsion, or other penalty, from imparting to the Odd-Lot Cotton Exchange, or to its members, the prices or quotations prevailing upon the New York Cotton Exchange, except the continuous quotations as defined in Exhibit A hereto annexed.

Thirteenth. This defendant denies each and every allegation contained in the Twenty-ninth, Thirtieth, Thirty-first, Thirty-second, Thirty-third, Thirty-fourth, Thirty-fifth, Thirty-sixth, Thirty-seventh and Thirty-eighth paragraphs of the bill.

Fourteenth. This defendant alleges that it is a private corporation organized under a special Act of the Legislature of the State of New York, being Chapter 365 of the Laws of 1871 of said state and the acts amendatory thereof and supplementary thereto and that it was incorporated

"to provide, regulate and maintain a suitable building room or rooms, for a Cotton Exchange in the City of New York, to adjust controversies between its members, to establish just and equitable principles in the trade, to maintain uniformity in its rules, regulations and usages, to adopt standards of classification, to acquire, preserve and disseminate useful information connected with the cotton interests throughout all markets, to decrease the local risks attendant upon the business, and generally to promote the cotton trade of the City of New York, increase its amount and augment the facilities with which it may be conducted, and to make provision for the widows and families of deceased members."

[fol. 37] That it is by this Act authorized to purchase and own real estate, and does own an Exchange building wherein this defendant provides an Exchange Room for the exclusive use of its own members, where many of them meet every business day between the hours of 10 A. M. and 3 P. M. (except Saturday, when the market closes at 12 M.), to make contracts (for themselves or as brokers for their customers) for the purchase and sale of cotton for future delivery, said transactions aggregating many million bales of cotton annually; that such purchases and sales are permitted to be made, and are made, only during said market hours and by open viva voce bidding; that a knowledge of the prices thus made in said transactions upon said Exchange has become a species of property of such value to this defendant that Telegraph Companies are willing to pay to this defendant large sums of money for the privilege of receiving instantaneously said quotations and distributing the same to their customers, and many persons throughout the United States, who are engaged in said cotton and commission business, are willing to and do pay said Telegraph Companies therefor; but that such quotations are a peculiar kind of property; that their value depends upon the power to confine the transmission and distribution thereof to such Telegraph Companies and other distributing agencies as will contract therefor with this defendant, and that if any person or corporation is permitted to acquire

promptly said quotations surreptitiously or by theft or without paying this defendant therefor, such person or corporation can promptly give the same to numerous other persons throughout the United States, and the Telegraph Companies contracting with this defendant for said quotations would thus be put at a disadvantage in competi- [fol. 38] tion with such persons so obtaining such quotations without paying this defendant therefor, and would thereby be deterred from continuing to pay this defendant the prices provided in said contracts of this defendant with said Telegraph Companies.

Fifteenth. That said quotations on the Exchange of this defendant are collected and distributed in the following manner: Experienced persons employed by this defendant are during the market hours kept in its Exchange Room, whose duty it is to note immediately on slips of paper the price in every transaction made on said Exchange during said market hours and to send immediately its said quotations, so noted, to a telegraph operator on the floor of said Exchange, in the employ of the Western Union Telegraph Company, who at once transmits said quotations over telegraph wires running through the offices of said company in the City of New York, and thence, with the aid of reinforcing instruments, they are automatically transmitted over wires running to many of the larger cities and places in the United States, and these wires in said cities are connected with and attached to Morse telegraph instruments located in the offices of persons desiring to use said quotations and contracting with this defendant therefor: In some large cities, including the City of New York, said quotations are also redistributed by said telegraph companies by means of what is known as the "ticker system," which consists of a ticker transmitter located in the office of the Telegraph Company operating said system in said cities [fol. 39] respectively and connected with sundry telegraph wires running to various places of business in such cities of persons desiring to use, and willing to contract with said defendant for, such quotations, each of said wires being connected in each of said offices with an electrical instrument known as a ticker, whereby the quotations thus electrically transmitted over said wire to said ticker are automatically and immediately printed upon an automatic unrolling roll of paper called a tape, so that persons in said offices can read the same on said tape; and by means of one or the other of the methods here indicated the continuous quotations of prices made in the exchange hall of this defendant can be, and are, communicated to persons in all parts of the United States within fifteen to twenty seconds after said prices are made in transactions on this defendant's exchange.

Sixteenth. That for some time prior to July 14, 1903, this defendant permitted the Western Union Telegraph Company and the Postal Telegraph Cable Company, to gather such quotations, through their own employees upon said exchange floor, and to distribute the same to their customers without any effective restrictions upon the persons entitled thereto. This defendant is informed and believes that said telegraph companies soon proceeded to sell said quotations

to all persons, desiring them for any purpose, and that by reason thereof many persons acquired said quotations from said telegraph companies for the purpose of using the same in conducting so-called bucket shops, and that by reason thereof the bucket shop evil assumed such large proportions that it brought into discredit this defendant and its members in the minds of many people, who [fol. 40] ignorantly supposed from said use of this defendant's quotations as a basis of said bets that said bucket shops were in some way connected with this defendant. That by reason of the premises aforesaid this defendant found it necessary to and did on, to wit, the 14th day of July, 1903, terminate said right or license of said telegraph companies to collect this defendant's quotations, and soon thereafter adopted certain reasonable regulations calculated to prevent the sale and distribution of this defendant's quotations to persons conducting so-called bucket shops, and to this end this defendant formulated a written contract to be signed by said telegraph companies receiving and distributing said quotations.

Seventeenth. That thereafter and on the 14th day of July, 1903, this defendant entered into written contracts with said Western Union Telegraph Company and Postal Telegraph Cable Company, wherein each of said telegraph companies agreed to pay this defendant certain substantial sums of money for the privilege of receiving said quotations, and wherein each of said telegraph companies agreed to co-operate with this defendant in safe-guarding said quotations and preventing them from being received by persons desiring them for bucket shop or illegal purposes; That said contracts have since said date remained in full force and effect, except that in some certain minor provisions changes have been made therein, and that on or about the 21st day of April, 1922, a new contract was executed between said Western Union Telegraph Company and this defendant, and a similar contract between this defendant and the Postal Telegraph-Cable Company, both of which contracts have since been and are now in full force and effect. That in each of said contracts it was provided that this defendant at its [fol. 41] own cost should collect and furnish said quotations to each of said telegraph companies, party thereto, and it was provided that said telegraph company might serve said quotations to all persons, firms or corporations, excepting those who might be directly or indirectly engaged in the promotion or maintenance of bucket shops or other places where such continuous quotations are used as a basis for bets or other illegal contracts based upon the fluctuations of prices of cotton on said Exchange; but that said telegraph company should not be under the duty to investigate or determine the character of the business conducted by any person applying for or receiving said quotations, but said contracts provide that the telegraph company should not under any circumstances, directly or indirectly, furnish said continuous quotations to any person, firm or corporation until such person, firm or corporation shall have signed in duplicate an application in writing addressed to the telegraph company in substantially the form attached to said contracts

and until such application shall have been approved by this defendant; that by said contract it is further provided that said telegraph company may furnish any of said quotations to its customers at intervals of fifteen minutes or more without requiring such customer to sign said application. A copy of said contract with said Western Union Telegraph Company and of the form of application attached thereto are hereto annexed and made a part hereof as Exhibit A. Said two contracts with the said telegraph companies are still in full force and effect, and the said two telegraph companies have been since the date of said contract and are now receiving from this defendant its said continuous quotations under [fol. 42] said contracts, and no other person, firm or corporation has sought or acquired from this defendant the right to receive, sell or distribute said quotations. This defendant denies that said contract between the New York Cotton Exchange and the Western Union Telegraph Company and the Gold and Stock Telegraph Company is in restraint of trade or commerce among the several States, or that it was made or entered into pursuant to a conspiracy on the part of the New York Cotton Exchange, or its members, in restraint of trade or commerce among the States.

Eighteenth. This defendant is informed and believes and charges the fact to be that every person now, or since the making of said contracts, receiving said continuous quotations from either of said telegraph companies has executed and delivered an application in substantially the form above set forth and his said application has, before the delivery of any quotations thereunder, been approved and accepted by this defendant.

Nineteenth. That when said Odd-Lot Exchange made application to said telegraph companies for the continuous quotations of this defendant this defendant caused a careful investigation to be made as to the character and purposes of said Exchange and its said members, and was then informed and believed, and it still believes and charges, the fact to be, that the said Odd-Lot Exchange has been organized to succeed to the business of, and take the place of, another so-called exchange known as the American Cotton Exchange; that many of the active members of the present Exchange were active members of such American Cotton Exchange, and that the purpose of organizing said [fol. 43] Odd-Lot Exchange was to enable its members to conduct the same kind of business as they were conducting when members of said American Cotton Exchange; that the said American Cotton Exchange was indicted by the Grand Jury of the County of New York on the charge of running a bucket shop contrary to Sections 390 and 394 of the Penal Law of the State of New York, and that after an extended trial on said indictment said American Cotton Exchange was found guilty and convicted by the Supreme Court of the State of New York, of conducting a bucket shop and sentenced to pay a fine of $5,000, and that as a result of said conviction said American Cotton Exchange has ceased to function and by reason thereof many of the active members of said American Cotton Exchange have now

organized and are maintaining said Odd-Lot Cotton Exchange, for the purpose of enabling such former members of the said American Cotton Exchange to conduct bucket shops under the guise of being members of an exchange; and that this defendant refused to approve said application of said Odd-Lot Exchange for the reasons aforesaid and also because this defendant believes that there is no commercial necessity or reason for the existence of a cotton exchange, whereon contracts for the future delivery of cotton in less than 100 bale lots are made, and that the maintenance of such an exchange will conduce to improper speculation by persons of small means and inadequate knowledge; and this defendant insists that it has a legal right to safeguard its quotations and to refuse to give them to any person, who in its judgment will not safeguard said quotations or will misuse them, or give them to others who will use them for the purpose of promoting bucket shops or other improper speculation, and that [fol. 44] upon the question, whether any applicant desires them for such purpose, its judgment and decision is final and not subject to judicial control or review.

Twentieth. This defendant denies that it entered into said contracts with said two Telegraph Companies, or that it has refused to approve the application of said Odd-Lot Cotton Exchange for the said quotations, for the purpose of monopolizing either interstate commerce or intra-state commerce in cotton, and alleges that the purpose, intent and effect of the said two contracts and of this defendant's action thereunder and its refusals of applications for quotations is to safeguard its said quotations and prevent their use in bucket shops or for other illegal purposes; and that this defendant denies that it has refused to approve the application of said Odd-Lot Cotton Exchange for any other reason than as aforesaid.

Twenty-first. This defendant is informed and believes and charges the fact to be that, notwithstanding its refusal to approve said application of said Odd-Lot Cotton Exchange for said quotations, said Exchange is now, either itself purloining said quotations of this defendant, or receiving them from some person who is purloining them, and is giving the same to its members, who in turn are distributing them over telegraph wires to many offices in the Southern States, wherein bucket shops are conducted, and wherein said quotations are displayed on blackboards for the purpose of promoting the conduct of said bucket shops, and that the unauthorized receipt and use of said quotations by said plaintiff and its members, as aforesaid, is calculated to and in time will, if not entirely stopped, seriously impair [fol. 45] the value of this defendant's said quotations, and thus ultimately entirely defeat the efforts of this defendant to prevent the use of such quotations in bucket shops as a basis of illegal bets, and will also materially impair the right of this defendant to derive a revenue from the distribution of said quotations, and this defendant is advised by its counsel that the only adequate jurisdiction for the protection of its property in said quotations is that of a court of equity, and the only adequate remedy is a writ of injunction iss-ing therefrom, permanently enjoining said Odd-Lot Cotton Exchange

from receiving, using or distributing said quotations, and that the amount involved in the matter set up in this counterclaim, and matter in dispute involved herein, exclusive of interest and costs, is much more than the sum of $3,000.

Wherefore, this defendant prays that the Bill of Complaint herein be dismissed as to said defendant with its costs and this defendant asks that this answer be taken as a counterclaim under the Rules in such case made and provided, and that said Odd Lot Cotton Exchange be required to make true, direct and complete answer to this defendant's said counterclaim, but not under oath (an answer on oath being hereby waived), and that a temporary injunction may immediately issue and upon final hearing hereof be made perpetual, restraining said Odd-Lot Cotton Exchange and each and every of its officers, agents, employees and servants from receiving, using, selling or distributing, directly or indirectly, the quotations of this defendant, or any of them, and from having, maintaining or permitting any telegraph or other wire running into or through its office or exchange, over which said quotations or any of them are passing and from aiding, abetting or assisting, directly or indirectly, any member of said [fol. 46] Odd-Lot Cotton Exchange, or any other person, firm or corporation, in the City of New York using, selling or distributing said quotations or any of them, until it, he or they shall have first lawfully acquired the right to receive said quotations, either by contract or purchase from this defendant, or with this defendant's consent and approval, from one of the Telegraph Companies authorized by this defendant to distribute such quotations and that this defendant may have such other and further relief in the premises as will fully protect this defendant's property right in said quotations and which to this Honorable Court may seem meet.

May it please this Honorable Court to grant to this defendant a preliminary and permanent injunction against said Odd-Lot Cotton Exchange and others, as above prayed, and also a writ of subpœna of the United States directed to said Odd-Lot Cotton Exchange, commanding it on a day certain to appear and answer this counterclaim and to abide and perform such decree as may be entered by this Court.

New York Cotton Exchange, by George M. Shutt, President.
Cadwalader, Wickersham & Taft, Solicitors for Defendant New York Cotton Exchange. Office and post office address, 40 Wall street, Borough of Manhattan, New York City.
Henry W. Taft, Henry S. Robbins, of Counsel.

[fol. 47] Jurat showing the foregoing was duly sworn to by George M. Shutt omitted in printing.

Exhibit A to Answer

This agreement made and entered into this 4th day of April, 1922, by and between the Western Union Telegraph Company, hereinafter designated as the Telegraph Company, party of the first part, and

the New York Cotton Exchange, hereinafter designated as the Exchange, party of the second part,

[fol. 48] Witnesseth:

That whereas the Telegraph Company desires the privilege of receiving for distribution to its customers complete quotations of prices at which transactions in cotton are made during business hours upon the trading floor of the Exchange; and

Whereas the Telegraph Company desires to collect all quotations, reports and statistics posted, announced or read off on the trading floor of the Exchange; and

Whereas, the Exchange desires the Telegraph Company to furnish and deliver to it such quotations and reports of domestic cotton markets, reports on the movement of cotton and reports of the weather and Governmental reports on condition, acreage, yield, ginning of cotton and such other reports as the Exchange may require; and

Whereas the Exchange and the Telegraph Company are willing to grant each to the other the foregoing privileges upon the terms hereinafter set forth;

Now therefore in consideration of the premises and of the covenants and agreements herein contained the parties hereto have mutually agreed as follows:

First. The Exchange agrees at its own cost and expense to furnish to the Telegraph Company under the limitations, conditions and restrictions hereinafter prescribed, full and continuous quotations of the prices at which transactions in cotton are made upon the floor of the Exchange during the hours for trading prescribed by its rules. Said continuous quotations wherever referred to in this agreement shall be construed to mean every service of quotations wherein the [fol. 49] price of cotton shall be quoted oftener than at intervals of fifteen (15) minutes and shall embrace substantially such as have been supplied by the Exchange to the Telegraph Company under the contract heretofore existing between them. The Exchange does not guarantee the accuracy or completeness of said quotations but undertakes to use reasonable diligence to make the same as full, complete and accurate as may be practicable; it being distinctly understood and agreed however that the Exchange shall not be liable to the Telegraph Company for any inaccuracies, errors or omissions in said quotations or for any damages arising therefrom or occasioned thereby.

The Exchange shall maintain Morse telegraph instruments on its trading floor and also the wires connecting said instruments with the Telegraph Company's wires at such point or points in the building occupied by the Exchange as may be determined by the Exchange; it being understood and agreed that all such instruments and wires as are now or may hereafter be located on the property occupied by the Exchange for the purpose of carrying out the terms of this agreement shall belong to and be controlled by the Exchange, which shall have the exclusive right and title thereto; and it being further understood and agreed that the said wires shall be such and only such wires as are shown in the attached sketch (which is hereby

made a part and parcel of this agreement) and as may be installed only with and by the approval of the Exchange. The Telegraph Company shall be permitted to connect its wires with the Exchange's wires and thence from said building to the Telegraph Company's [fol. 50] Commercial News Department and its main office in New York City and/or directly with its offices in other cities; and the Exchange shall transmit said quotations from said instruments directly and promptly over its wires connecting with the Telegraph Company's wires, using therefor skilled and competent operators in the Exchange's employ who shall be satisfactory to and subject to the approval of the Telegraph Company, and the Telegraph Company shall receive said quotations over its wires by its operators. The wires of the Telegraph Company connecting with those of the Exchange may be connected with any other wires by repeater or other device and the quotations shall be taken from them by operators of the Telegraph Company at its offices and may be retransmitted by the Telegraph Company's operators over other wires to its customers.

The Telegraph Company shall so arrange and protect all wires over which said quotations are transmitted to its main office, Commercial News Department and its other offices as aforesaid, that said wires as far as possible cannot be tapped or said quotations taken off said wires or in any way diverted or distributed prior to their being taken off at said main office and Commercial News Department or other offices as hereinbefore provided.

The Telegraph Company may furnish said quotations in whole or in part to its customers by means of tickers or by telegraph or telephone wires and instrument or by messengers, subject to the limitations, conditions and restrictions of this agreement. The Telegraph Company in relaying said quotations to its offices and customers shall use its utmost endeavors to prevent the tapping of any wire or wires over which the same are transmitted and to prevent [fol. 51] any persons other than those to whom it furnishes the same, after full compliance with the limitations, conditions and restrictions hereof, from obtaining the same from it or from any of its employes.

The relaying rooms of the Telegraph Company in New York City shall be located at the offices of the Telegraph Company at its Commercial News Department, 24 Walker Street, or at such other place or places as may be mutually agreed upon by the parties hereto. At any and all reasonable times properly accredited persons designated by the Exchange shall have access to said relaying rooms and to all relaying rooms in other cities and test rooms through which wires used in transmitting said continuous quotations pass, and the right to examine, in the presence of the Telegraph Company's officials in charge thereof, all appliances and observe all operations located or carried on therein. Otherwise, no one shall be authorized to have access to the quotations in said relaying rooms during business hours except the officers of the Telegraph Company and its employes engaged in relaying or handling said quotations.

The Telegraph Company shall, in each and every instance where it publishes or uses the time in connection with the continuous quotations of the Exchange, quote the official time establishes and used by the Exchange.

The Exchange agrees that the Telegraph Company may place and keep in such part or parts of said Exchange building as the Exchange shall designate, and set apart for the purpose, such printing instruments as may be necessary for the use of the Telegraph Company, it [fol. 52] being understood that the matter reported thereon is to be so reported solely for the Telegraph Company and not for the Exchange or its members, and it being further understood that such printing instruments are not to occupy any more space than the Exchange or its officers shall deem it convenient to set apart therefor.

Second. The Telegraph Company shall have the right to serve said quotations to members of the Exchange or to any firm of which a member of the Exchange is a partner, at their offices or branch offices, and shall charge such members of the Exchange, or their firms, for the use of tickers delivering such quotations in their offices in New York City, not exceeding Twenty-five dollars ($25.00) per month for each ticker installed south of Chambers Street, and Thirty dollars ($30.00) per month for each ticker installed in Chambers Street or in streets between Chambers and 60th Street and Thirty-five dollars ($35.00) per month for each ticker installed in 60th Street and in streets between 60th and 125th Streets including the latter.

The Telegraph Company shall have the right to serve said con--inuous quotations to all persons, firms, corporations and organizations in New York City or elsewhere, wherever the Telegraph Company may desire to serve them, including any other Telegraph Company owned, leased or controlled by it or with which it now has or may hereafter have any operating contract or other arrangement for exchange of business, but not to persons, firms or corporations who or which may be directly or indirectly engaged in the promotion or maintenance of bucket shops or other places where such continuous quotations are used as a basis for bets or other illegal con- [fol. 53] tracts based upon fluctuations of the prices of cotton or of any stocks, bonds or other securities or commodities wherein both parties, or the party maintaining such office or place or conducting such business, or said subscriber, contemplate or intend that such contracts, agreements, trades, or transactions shall, or may be, closed, adjusted or settled according, or with reference, to the quotations of any Exchange, Board of Trade, or market place, upon which cotton, stocks, bonds or other securities or commodities are dealt in, together with the right to collect its tolls and charges therefor, which tolls and charges shall belong to and be retained by the Telegraph Company.

Nothing herein contained shall be construed as imposing upon the Telegraph Company the duty to investigate and determine the character of the business conducted by any person, firm or corporation applying for or receiving said continuous quotations but the

Telegraph Company shall not under any circumstances directly or indirectly furnish said continuous quotations to any person, firm, corporation or organization whether members of the Exchange or not until such person, firm, corporation or organization shall have signed in duplicate an application in writing addressed to the Telegraph Company in substantially the following form, and the applicant shall have been approved by the Exchange:

Application for Continuous Quotations of the New York Cotton Exchange

—— —, 19—.

The Western Union Telegraph Company:

We hereby apply to you for a service of continuous quotations of [fol. 54] the New York Cotton Exchange, furnished you under contract between you and said Exchange, said quotations to be furnished to us at —— by —— ——; and we represent and agree with you as follows:

1. That our business is and shall be the business of —— and that said business is conducted under the firm name and style of —— ——, and that notice of any change of the name, nature or place of said firm or business shall at once be given to the said Western Union Telegraph Company; and that we are not keeping or causing to be kept and will not keep or cause to be kept, or be in any wise interested in, or in any way assist or promote; any bucket-shop or bucket-shop business, or any office, store or other place wherein is conducted or permitted the business of making or offering to make, contracts, agreements, trades or transactions, either orally or in writing, respecting the purchase or sale (or the purchase and sale) of cotton, or any stocks, bonds or other securities or commodities wherein both parties, or the party maintaining such office or place or conducting such business, or the undersigned, contemplate or intend that such contracts, agreements, trades, or transactions shall, or may be, closed, adjusted or settled according, or with reference, to the quotations of any Exchange, Board of Trade, or market place, upon which cotton, or stocks, bonds or other securities or commodities are dealt in; otherwise than by an actual bona fide transaction or purchase or sale, or wherein both parties or the party maintaining such office or place or conducting such business or the undersigned contemplate or intend that such contracts, agreements, [fol. 55] trades or transactions shall, or may, be closed or terminated when the quotations of some such Exchange, Board of Trade, or market place respecting the cotton, or stocks, bonds or other securities or commodities specified in such contracts, agreements, trades or transactions shall reach a certain figure; and we agree that we will not use, or allow anyone else to use, such quotations or any of them for any such purpose or in any such bucket-shop, office or place.

2. That said quotations are to be received by us only for our private and individual use in our said business at the office or place above designated; and that we will not communicate or otherwise furnish

or permit to be communicated or otherwise furnished, said quotations to any news distributing company or telegraph company, or any person or corporation, nor to any other place than that above designated, nor allow any person or corporation whatsoever to take directly or indirectly said quotations from said office. But nothing herein contained shall preclude us from furnishing said quotations to any branch office of ours, nor to any of our correspondents, provided that said branch office or offices shall first be approved by the New York Cotton Exchange, and further provided that before furnishing said quotations to any such correspondent such correspondent shall be approved by the New York Cotton Exchange, and we shall first obtain in duplicate (one of which shall be delivered to you and one to the New York Cotton Exchange) an agreement signed by such correspondent in which said correspondent shall agree with the Western Union Telegraph Company to abide by and comply with clauses 1, 2, 3, 4 and 7 hereof. If the undersigned [fol. 56] shall furnish, or permit to be furnished, said quotations, or any of them, to any person, firm or corporation excepting after compliance with the provisions hereinbefore contained, the undersigned hereby agrees that the Western Union Telegraph Company may sue the person, firm or corporation to whom said quotations or any of them are thus furnished to prevent the receipt or use thereof by said person, firm or corporation without making the undersigned a defendant thereto, provided the undersigned does not, or in case of a partnership all the members thereof do not, reside within the jurisdiction of the Court in which said suit is brought.

3. That the office or place above designated shall not be connected by any private telegraph or telephone wire, or other wire connection, or other means of communication with the office or place of business of any person or persons, or corporation, engaged in the business of making contracts agreements, trades or transactions respecting the purchase and sale of cotton, or stocks, bonds or other securities or commodities, or with any place where such business is conducted, unless the New York Cotton Exchange shall have been notified of such connection and shall not have disapproved the same; nor with any branch office or correspondent excepting such branch offices and correspondents as have been approved by the New York Cotton Exchange as provided in Clause 2 hereof. But nothing in this clause contained shall be construed as applying to the private wire connections of members of the New York Cotton Exchange which have been approved in conformity with its rules.

4. That at any and all times any person or persons designated [fol. 57] by the Western Union Telegraph Company or the said New York Cotton Exchange shall have access to the offices or place above designated, and the right to observe the use made of said quotations, and to examine and inspect all instruments and apparatus used in connection with the said service in said office or place.

5. That the Western Union Telegraph Company may, with or without notice, forthwith discontinue said service whenever in its judgment there shall have been any breach of the foregoing agreements, or any of them, by the undersigned, or whenever directed so to do by said New York Cotton Exchange.

6. That the Western Union Telegraph Company and the New York Cotton Exchange shall not be pecuniarily liable for the accuracy of the quotations which it may furnish under this application, nor for any delays, inaccuracies, errors or omissions in said quotations, or for any damages arising therefrom or occasioned thereby.

7. That quotations wherein the price of cotton shall be quoted oftener than at intervals of fifteen (15) minutes shall be deemed to be continuous quotations within the meaning of this application. Accepted:

The Western Union Telegraph Company, by —— ——.

Applicant Approved: New York Cotton Exchange, by —— ——.

One of said applications when signed shall be delivered to the [fol. 58] Exchange, but said application and the acceptance thereof by the Telegraph Company shall not be effectual for any purpose until the applicant shall have been approved by the Exchange. Notice shall be given as promptly as possible by the Exchange of its approval or disapproval of the applicant.

The Telegraph Company may furnish any quotations furnished to it hereunder to its customers at intervals of fifteen (15) minutes or more without requiring such customers to sign the said application form.

The Telegraph Company agrees that it will use its best endeavors to prevent any persons other than those approved by the Exchange as hereinbefore provided for, from obtaining said continuous quotations; and that in case said continuous quotations are obtained by persons not so approved it will use its best endeavors to ascertain the source from which the same are obtained and to inform the Exchange fully in respect thereto. The Telegraph Company further agrees that in case any subscriber shall fail to comply with any of the conditions, restrictions and limitations contained in the application signed by him as hereinbefore provided, it will terminate the contract between him and it and the furnishing of said quotations to him thereunder.

The Telegraph Company shall as soon as practicable furnish to the Exchange a list of persons to whom it is now furnishing continuous quotations and interval quotations of the Exchange under subsisting contracts, with their full names and addresses and business occupations, and shall at reasonable intervals of time, when requested so to do by the Exchange, furnish the Exchange with a [fol. 59] complete list of persons to whom it is then furnishing said continuous and interval quotations together with similar information in respect to them.

The Telegraph Company agrees that its right to furnish said continuous quotations to any person, firm, corporation or organization shall cease and determine immediately upon receipt of a notice in writing from the Exchange to cease and discontinue furnishing said continuous quotations to such person, firm, corporation or organization, and the Telegraph Company agrees that immediately upon receipt of such a notice from the Exchange it will issue instructions to its employes to comply therewith and cease and discontinue furnishing said continuous service to such person, firm, corporation or organization, and will see that such instructions are complied with; Provided, However, that the Telegraph Company shall not be required to remove any of its tickers or wires or to discontinue service furnished by any other means, which are under restraint by injunction of the Courts, during the pendency of such injunction.

In cases were an application has been approved by the Exchange and the Telegraph Company has been serving the quotations under the provisions of this contract or of the contract of April 21st, 1920, or December 12th, 1921, and the Exchange shall give notice to the Telegraph Company to discontinue said service and legal proceedings shall thereupon be commenced against the Telegraph Company or the Exchange on account of such discontinuance, said proceedings shall be defended by the Exchange which shall and hereby does agree to pay all counsel and attorney's fees, costs, charges, damages, fines, expenses and penalties to which the Telegraph Com- [fol. 60] pany may be put by such discontinuance or refusal to serve said quotations.

In cases brought against the Telegraph Company the Exchange may defend by its own counsel at its own expense in the name of the Telegraph Company.

In cases where an application has not been approved by the Exchange and legal proceedings shall be thereupon commenced against the Telegraph Company on account of its refusal to furnish said quotations, the Telegraph Company shall at its own cost and expense defend such litigation and shall use diligent efforts to secure the removal of any injunctions obtained in said causes in cases in which the Exchange may so desire or request.

In cases where an application has not been approved by the Exchange and legal procedings shall thereupon be commenced by such applicant for said quotations against the Exchange on account of its refusal to permit the Telegraph Company to serve said quotations, the Exchange shall at it own cost and expense defend against said litigations thus instituted against it.

Third. The Exchange further agrees to permit the Telegraph Company to collect all quotations, reports and statistics, posted, read off, or announced on the trading floor of the Exchange (other than its continuous quotations) and to use the same wherever it may desire to do so in its business and to retain all the revenue from the sale thereof.

Fourth. The Exchange agrees that it will not grant the privilege of receiving and transmitting or using nor will it furnish to any

[fol. 61] person, party, firm or corporation other than the Telegraph company and the Postal Telegraph-Cable Company any quotations originating on the floor of the Exchange or any other quotations, reports or statistics, posted, read off or announced on said floor, nor will the Exchange so far as it can lawfully prevent the same, permit, suffer or allow any of its members, employes or other persons to transmit, distribute or deliver for sale any of the said continuous or other quotations, reports and statistics, as herein before provided, nor will the Exchange do any act whereby any other person, firm or corporation other than the Telegraph Company party hereto and the above-mentioned Postal Telegraph-Cable Company shall acquire any right to receive, use, transmit or deliver for sale or distribution any of the said continuous or other quotations, reports and statistics.

The Exchange may grant to the said Postal Telegraph-Cable Company (hereinafter termed the Postal Company) the same right to receive and transmit the aforesaid continuous or other quotations, reports and statistics, only as is hereby granted to the Telegraph Company, and in that case the exchange shall require said Postal Company to execute a contract upon practically the same terms and conditions all and singular and in the same manner as herein set forth, except as to the amount to be paid thereunder, which shall be a sum not less than $4,000 per annum, payable in cash, so long as no greater use of said matter is made by said Postal Company than at present; it being understood and agreed that in case said Postal Company shall at any time actively compete with the Telegraph [fol. 62] Company in distributing and selling said matter, the Exchange shall require said Postal Company to pay the same price therefor as is herein agreed to be paid by the Telegraph Company, such increase to be effective after the close of the current contract year; and it being further understood and agreed that the said Postal Company shall not sell or dispose of the continuous quotations, reports and statistics to any Exchange or Board of Trade in the United States, unless and except the said Postal Company competes actively with the Telegraph Company and pays to the Exchange the same amount as herein agreed to be paid by the Telegraph Company.

The quotations shall be delivered by the Exchange to the Telegraph Company, to the Postal Company and to its own blackboard simultaneously; and the Exchange may arrange with the Postal Company for delivering the quotations to it either by wire in the same manner as to the Telegraph Company, or in manuscript at the Postal Company's office in the Exchange, or in any other manner desired by the Postal Company which shall not give it any advantage over the Telegraph Company as to time in receiving said quotations from the Exchange.

The Exchange agrees that in passing upon applications for the aforesaid continuous quotation service presented by the Telegraph Company and the said Postal Company, it will act without discrimination as between them and that whenever the Exchange shall have before it at the same time applications from the same person, firm or corporation presented both through the Telegraph Company party

hereto and said Postal Company, it will, if it approves said applications, approve both at the same time and notify at the same time both of said Telegraph Companies of such approval.

[fol. 63] For the purpose of protecting the Telegraph Company against the use of any of the said continuous or other quotations, reports and statistics by parties not entitled to them, the Telegraph Company may prosecute by suit, injunction or other legal remedies proper and suitable for the prevention or stoppage of such competitive use, either in its own name or in the name of the Exchange or its proper officers, any party or parties obtaining or using said continuous or other quotations, reports and statistics not entitled to them whether obtained from the Exchange or its members, officers or employees or otherwise; and in case the Telegraph Company shall sue and proceed in the name of the Exchange, the Exchange shall by its proper officers do all such proper acts and things and sign all such proper and necessary papers in order to enable the Telegraph Company to conduct said proceedings with due diligence and effect. All such suits and other legal proceedings whether carried on by the Telegraph Company in its own name or in the name of the Exchange shall be at the sole cost and expense of the Telegraph Company, and the Telegraph Company agrees to indemnify and save harmless the Exchange of and from all damages, expenses, cost, charges, fees, fines and penalties, incurred in or arising out of any such suit or proceeding.

Fifth. As compensation for the privilege of receiving and serving said continuous and/or other quotations, reports and statistics, hereby granted by the Exchange to the Telegraph Company, the Telegraph Company agrees to pay to the Exchange the sum of Twenty-seven thousand five hundred dollars ($27,500.00) per annum in equal in-[fol. 64] stallments of Two thousand two hundred and ninety-one and 66/100 dollars ($2,291.66) at the close of each month during the continuance of this agreement; and in case the Telegraph Company shall make default in the payment of any such installment for the period of thirty days after the same becomes due, the Exchange may forthwith terminate such privilege without notice.

Sixth. The Telegraph Company further agrees to furnish to the Exchange daily (Sundays and holidays excepted unless especially requested by the Exchange to furnish the service on an Exchange holiday) and to deliver by Morse wire connected with the office of the Exchange in New York City, such quotations and reports of domestic cotton markets, such reports on the movement of cotton and such Governmental reports on the weather, on cotton condition, acreage, yield and ginning as the Exchange may from time to time require; also such other reports, issued by the Government or otherwise, as may be specially required by the Exchange and which the Telegraph Company may be able to collect or obtain from sources indicated by the Exchange or otherwise. Changes may be made in said service by mutual agreement, both in the character of the reports and in the place of origin; provided that in all cases where extra expense shall be incurred by the Telegraph Company in the collection or transmis-

sion of reports required by the Exchange, such extra expense shall be paid by the Exchange, but shall be subject to the approval of the Exchange before it is incurred.

The Telegraph Company agrees to furnish at its own expense the necessary skilled operators for receiving, handling and transmitting the quotations and reports covered by this Section of the agreement [fol. 65] at its own Commercial News Department, and the Exchange agrees to furnish at it own expense the necessary skilled operators for receiving the said quotations and reports at its office, and to keep the wire over which they are transmitted (known and to be known as the SU wire) continuously covered from nine-thirty A. M. until "Good Night" is given which shall not be later than 5 P. M., the Exchange to pay, in addition to the word rate, for all overtime at the same rate the Telegraph Company pays its employes. The Telegraph Company shall forward the said quotations and reports to the Exchange as promptly as may be practicable, subject to such errors, omissions and delays as are incidental to telegraphic transmission, and shall furnish as correct quotations and reports as can be obtained, but shall not be pecuniarily responsible for the accuracy of the same nor for errors, delays or other defaults or omission in the service, it being understood and agreed that the said quotations and reports shall not be released or made public in any way in New York City by the Telegraph Company or any of its employes until they shall have been transmitted to and received by the Exchange.

The Exchange agrees that all quotations and reports furnished to it hereunder by the Telegraph Company are for the sole and exclusive use of the Exchange on its trading floor, in its office, or in its various printed reports (excepting that the Telegraph Company reserves the right to use and sell them to other subscribers and to retain all the revenue therefrom) and the Exchange shall not permit said reports nor abstracts thereof to be collected or used by any other party in such a manner as to compete with the business of the Telegraph Company or to decrease its revenue from the sale thereof to others.

[fol. 66] In consideration of the foregoing agreements of the Telegraph Company, the Exchange hereby agrees during the continuance of this contract to pay to the Telegraph Company two and one-half ($2\frac{1}{2}$) cents per word for all quotations and reports furnished by the Telegraph Company and used by the Exchange and for all quotations and reports specially ordered by and furnished to the Exchange whether used by it or not, it being understood that in the transmission of figures by the Telegraph Company to the Exchange five numerals or fractions thereof in each message shall constitute one word. Settlements shall be made as soon after the close of each month as practicable, but not later than the date of payments by the Telegraph Company to the Exchange provided for in the Fifth Section hereof.

Seventh. The parties hereto agree that if at any time hereafter and before the expiration of this contract any dispute or difference shall arise between them concerning the true intent, meaning or construc-

tion of anything contained in this contract or concerning any matter included within the spirit or scope thereof or concerning the acts or omission of the Exchange or the Telegraph Company, then and so often as a dispute or difference shall arise any and all such matters in dispute or difference shall be submitted and referred to the award and determination of three arbitrators to be chosen one by the Exchange, another by the Telegraph Company, and the third by the two so chosen and the decision or award in writing of any two of the arbitrators shall be binding and final between the Exchange and the Telegraph Company and shall be carried out and performed by the Exchange or the Telegraph Company as the case may be.

[fol. 67] Eighth. The provisions of this agreement shall take effect on the First (1st) day of April, 1922, and shall be and continue in force for and during the full term of one year from said date, and shall further continue after the expiration of said term, from year to year, unless either party shall have given written notice of termination at least thirty days prior to the expiration of said terms; and after the close of said term of one year, either party may terminate this agreement at the end of any contract year after having given notice in writing of an intention so to do at least thirty days before the close of such contract year.

The agreements between the Western Union Telegraph Company acting for itself and as the lessee of the Gold and Stock Telegraph Company and the New York Cotton Exchange, dated respectively the twenty-first (21st) day of April, 1920 and the twelfth (12th) day of December, 1921 are hereby cancelled.

In witness whereof, the parties hereto have hereunto set their hands and seals the day and year first above written.

The Western Union Telegraph Company, by G. W. E. Atkins, 1st Vice-President. Attest: A. F. Burleigh, Secretary. (Seal.) New York Cotton Exchange, by E. E. Bartlett, Jr., Acting President. Attest: Thomas Hale, Secretary. (Seal.)

[fol. 68] Application for Continuous Quotations of the New York Cotton Exchange

—— —, 19—.

The Western Union Telegraph Company:

We hereby apply to you for a service of continuous quotations of the New York Cotton Exchange furnished you under contract between you and said Exchange, said quotations to be furnished to us at —— by —— ——; and we represent and agree with you as follows:

1. That our business is and shall be the business of —— and that said business is conducted under the firm name and style of —— ——, and that notice of any change of the name, nature or place of said firm or business shall at once be given to the said Western Union Telegraph Company; and that we are not keeping or causing to be kept and will not keep or cause to be kept, or be in any

wise interested in, or in any way assist or promote, any bucket-shop or bucket-shop business, or any office, store or other place wherein is conducted or permitted the business of making or offering to make, contracts, agreements, trades or transactions, either orally or in writing, respecting the purchase or sale (or the purchase and sale) of cotton, or any stocks, bonds or other securities or commodities wherein both parties, or the party maintaining such office or place or conducting such business, or the undersigned, contem- [fol. 69] plate or intend that such contracts, agreements, trades, or transactions shall, or may be closed, adjusted or settled according, or with reference, to the quotations of any Exchange Board of Trade, or market place, upon which cotton, or stocks, bonds or other securities or commodities are dealt in; or otherwise than by an actual bona fide transaction or purchase or sale; or wherein both parties or the party maintaining such office or place or conducting such business or the undersigned contemplate or intend that such contracts, agreements, trades or transactions shall, or may, be closed or terminated when the quotations of some such Exchange, Board of Trade, or market place respecting the cotton, or stocks, bonds or other securities or commodities specified in such contracts, agreements, trades or transactions shall reach a certain figure; and we agree that we will not use, or allow anyone else to use, such quotations or any of them for any such purpose or in any such bucket-shop, office or place.

2. That said quotations are to be received by us only for our private and individual use in our said business at the office or place above designated; and that we will not communicate or otherwise furnish or permit to be communicated or otherwise furnished, said quotations to any news distributing company or telegraph company, or any person or corporation, nor to any other place than that above designated, nor allow any person or corporation whatsoever to take directly or indirectly said quotations from said office. But nothing herein contained shall preclude us from furnishing said quotations to any branch office of ours, nor to any of our correspondents, pro- [fol. 70] vided that said branch office or offices shall first be approved by the New York Cotton Exchange, and further provided that before furnishing said quotations to any such correspondent such correspondent shall be approved by the New York Cotton Exchange, and we shall first obtain in duplicate (one of which shall be delivered to you and one to the New York Cotton Exchange) an agreement signed by such correspondent in which said correspondent shall agree with the Western Union Telegraph Company to abide by and comply with clauses 1, 2, 3, 4 and 7 hereof. If the undersigned shall furnish, or permit to be furnished said quotations, or any of them, to any person, firm or corporation excepting after compliance with the provisions hereinbefore contained, the undersigned hereby agrees that the Western Union Telegraph Company may sue the person, firm or corporation to whom said quotations or any of them are thus furnished to prevent the receipt or use thereof by said person, firm or corporation without making the undersigned

a defendant thereto, provided the undersigned does not, or in case of a partnership all the members thereof do not, reside within the jurisdiction of the Court in which said suit is brought.

3. That the office or place above designated shall not be connected by any private telegraph or telephone wire, or other wire connection, or other means of communication with the office or place of business of any person or persons, or corporations, engaged in the business of making contracts, agreements, trades or transactions respecting the purchase and sale of cotton, or stocks, bonds or other securities or commodities, or with any place where such [fol. 71] business is conducted, unless the New York Cotton Exchange shall have been notified of such connection and shall not have disapproved the same; nor with any branch office or correspondent excepting such branch offices and correspondents as have been approved by the New York Cotton Exchange as provided in Clause 2 hereof. But nothing in this clause contained shall be construed as applying to the private wire connections of members of the New York Cotton Exchange which have been approved in conformity with its rules.

4. That at any and all times any person or persons designated by the Western Union Telegraph Company or the said New York Cotton Exchange shall have access to the office or place above designated, and the right to observe the use made of said quotations, and to examine and inspect all instruments and apparatus used in connection with the said service in said office or place.

5. That the Western Union Telegraph Company may, with or without notice, forthwith discontinue said service whenever in its judgment there shall have been any breach of the foregoing agreements, or any of them, by the undersigned, or whenever directed so to do by said New York Cotton Exchange.

6. That the Western Union Telegraph Company and the New York Cotton Exchange shall not be pecuniarily liable for the accuracy of the quotations which it may furnish under this application, nor for any delays, inaccuracies, errors or omissions in said quotations, or for any damages arising therefrom or occasioned thereby.

[fol. 72] 7. That quotations wherein the price of cotton shall be quoted oftener than at intervals of fifteen (15) minutes shall be deemed to be continuous quotations within the meaning of this application. Accepted:

The Western Union Telegraph Company, by —— ——.

Applicant Approved: New York Cotton Exchange, by —— ——.

[fol. 73] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF THE WESTERN UNION TELEGRAPH COMPANY AND THE GOLD AND STOCK TELEGRAPH COMPANY

The Western Union Telegraph Company and Gold and Stock Telegraph Company, two of the defendants in the above entitled action for answer to so much of the amended bill in the above entitled cause as these defendants are advised it is necessary for them to make answer unto, say:

First. These defendants admit the First, Second, Third, Fourth, Fifth, Sixth and Seventh paragraphs of said bill.

Second. These defendants are without knowledge as to the truth of the allegations contained in the Eighth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth, Fourteenth, Fifteenth, Sixteenth, Seventeenth, [fol. 74] Eighteenth, Nineteenth and Twentieth paragraphs of said bill and ask that the plaintiff be required to make strict proof thereof.

Third. These defendants admit the allegations of the Twenty-first and Twenty-second paragraphs of said bill, except the allegation that the officers and directors of said companies are the same, which they deny.

Fourth. These defendants admit that they have entered into and now have a contract with the New York Cotton Exchange under and by which said Cotton Exchange gives them the right in common with the Postal Telegraph-Cable Company to disseminate continuous quotations of said Exchange to such persons as said Exchange shall approve, and that true copies of said contract and of the form of application which these defendants are required to take from those desiring said quotations, are set out as Exhibits to the answer herein of the New York Cotton Exchange, already filed herein, but these defendants deny that the purpose or intent of these defendants or of said New York Cotton Exchange in entering into said contract or in carrying out the same was to enable said New York Cotton Exchange to monopolize commerce in cotton, and these defendants admit that they refused to furnish said Odd-Lot Cotton Exchange with said quotations because said New York Cotton Exchange has refused to approve its applications therefor.

Fifth. These defendants are without knowledge as to the truth of the allegations contained in the Twenty-fifth, Twenty-sixth, Twenty-[fol. 75] seventh, Twenty-eighth and Twenty-ninth paragraphs of said bill, and therefore ask that the plaintiff be required to make strict proof thereof, except as to the allegation in the twenty-sixth paragraph that the New York Cotton Exchange has consented that the Exchanges at the places named receive the continuous cotton quotations and pursuant thereto such quotations have been furnished

by the Western Union Telegraph Company and the Gold and Stock Telegraph Company, which is admitted.

Sixth. These defendants deny that said contract between said New York Cotton Exchange and these defendants is in restraint of trade or commerce among the several States or was made or entered into in pursuance of a conspiracy on the part of the New York Cotton Exchange and its members in restraint of trade and commerce among the States, or that said contract or the refusal of said New York Cotton Exchange to allow said Odd-Lot Cotton Exchange to have a cotton ticker, together with the continuous cotton quotations, is an attempt on the part of the defendants or either of them to monopolize the trading in cotton for future delivery in the City of New York, or to monopolize cotton quotations and the dissemination thereof, or that said contract or said refusal constitutes an unfair method of competition in commerce contrary to the Acts of Congress in such cases made and provided.

Seventh. These defendants are without knowledge of the truth of the allegations contained in the Thirty-third paragraph of said bill, and therefore ask that the plaintiff be required to make strict proof thereof.

[fol. 76] Eighth. These defendants deny each of the allegations of paragraphs Thirty-fourth, Thirty-fifth, Thirty-sixth, Thirty-seventh and Thirty-eighth of said bill.

Ninth. These defendants admit that said contract, a copy of which is attached as Exhibit A to the answer of said New York Cotton Exchange, and a similar contract made between said New York Cotton Exchange and the Postal Telegraph-Cable Company, are still in full force and effect, and that said two Telegraph Companies have since the date of the said contract received and are now receiving from the said New York Cotton Exchange its said continuous quotations under said contract, and that no other person, firm or corporation has sought or acquired from the New York Cotton Exchange the right to receive, sell or distribute its said quotations.

Tenth. These defendants further allege that every person now or since the making of said contract between said New York Cotton Exchange and the Western Union Telegraph Company receiving said continuous quotations from either of these defendants has executed and delivered an application in substantially the form attached as an exhibit to said answer of the said New York Cotton Exchange, and that his said application has before the delivery of any quotations thereunder by these defendants been approved and accepted by said New York Cotton Exchange.

Eleventh. These defendants are informed and believe and charge the fact to be that notwithstanding the refusal of the said New York [fol. 77] Cotton Exchange to approve the said application of the said Odd-Lot Cotton Exchange for said quotations, said Exchange is now either self-purloining said quotations or is receiving them

from some one who is purloining them, and that said Odd-Lot Cotton Exchange is giving said quotations to its members, who in turn are distributing them over telegraph wires to many offices in the Southern States wherein bucket shops are conducted and wherein said quotations are displayed on blackboards for the purpose of promoting the conduct of said bucket shops, and that the unauthorized receipt and use of the said quotations by said plaintiff and its members, as aforesaid, is calculated to and in time will, if not entirely stopped, seriously impair the value of said quotations to these defendants, and the value of their said contract with the New York Cotton Exchnge, and these defendants are advised by their counsel that the only adequate jurisdiction for the protection of their said contract and their right in said quotations is that a court of equity, and that the only adequate remedy is a writ of injunction issuing therefrom permanently enjoining the said Odd-Lot Cotton Exchange from receiving, using or distributing said quotations, and that the amount involved in the matter set up in this counterclaim and the matter in dispute herein, exclusive of costs, is much more than the sum of $3,000.

Wherefore, these defendants ask that the bill of complaint herein be dismissed as to them at plaintiff's costs, and these defendants also ask that this answer be taken as a counterclaim under the rules in such cases made and provided, and that said Odd-Lot Cotton Ex- [fol. 78] change be required to make true, direct and complete answer to these defendants' said counterclaim, but not under oath (answer on oath being hereby expressly waived) and that a temporary injunction immediately issue and upon final hearing hereof be made perpetual, restraining said Odd-Lot Cotton Exchange and each and every of its officers, agents, employees and servants from receiving, using, selling, or distributing, directly or indirectly, the quotations of said New York Cotton Exchange, or any of them, and from having, maintaining or permitting any telegraph or other wire running into or through its office or exchange, over which said quotations, or any of them, are passing and from aiding, abetting or assisting directly or indirectly, any member of said Odd-Lot Cotton Exchange, or any other person, firm or corporation, in the City of New York, in selling or distributing said quotations or any of them, until it, he or they shall have first lawfully acquired the right to receive said quotations, either by contract from said New York Cotton Exchange or, with its consent and approval, from one of the Telegraph Companies authorized by said New York Cotton Exchange to distribute such quotations, and that these defendants may have such other and further relief in the premises as will fully protect these defendants' right in said quotations and which to your Honor may seem meet.

May it please your Honor to grant to these defendants preliminary and permanent injunction against said Odd-Lot Cotton Exchange and others, as above prayed, and also a writ of subpœna of the United States directed to said Odd-Lot Cotton Exchange, commanding it on a day certain to appear and answer this counterclaim and

[fol. 79] to abide by and perform such decree as may be entered by this Court.

The Western Union Telegraph Company, by G. W. E. Atkins. The Gold and Stock Telegraph Company, by E. Y. Gallaher.

Jurat showing the foregoing was duly sworn to by G. W. E. Atkins; omitted in printing.

[fol. 80] Jurat showing the foregoing was duly sworn to by E. Y. Gallaher; omitted in printing.

[fol. 81] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF MOTION FOR PRELIMINARY INJUNCTION

The above named complainant will please take notice that on the answer and counterclaim of the New York Cotton Exchange, verified February 5th, 1923; the answer and counterclaim of the Western Union Telegraph Company and the Gold and Stock Telegraph Company, verified February 5th, 1923; the affidavit of Robert J. Hall, verified February 9th, 1923; the affidavit of Gardner Irving, verified February 9th, 1923; the affidavit of Thomas Hale, Jr., verified February 10th, 1923; and the affidavit of George J. Burmeister, verified February 10th, 1923; the defendants will move this Court at a term thereof to be held for the hearing of motions at 10 o'clock A. M., on the 16th day of February, 1923, at the United States District Court Building, in the City of New York, or as soon thereafter as counsel can be heard for an order granting the defendants a pre-
[fol. 82] liminary injunction, as prayed for in their respective answers and counterclaims.

Dated, New York, February 10, 1923.

Cadwalader, Wickersham & Taft, Solicitors for Defendant, New York Cotton Exchange, No. 40 Wall Street, New York City. Francis R. Stark, Solicitor for Defendants, The Western Union Telegraph Conmpany and The Gold and Stock Telegraph Company, No. 195 Broadway, New York City.

To John M. Coleman, Esq., Solicitor for the Complainant, No. 29 Broadway, New York City.

[fol. 83] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF ROBERT J. HALL

STATE OF NEW YORK,
Southern District of New York,
County of New York, ss:

Robert J. Hall, being duly sworn, deposes and says, that he is the Manager of the Bureau of Tariffs and Taxes of the Postal Telegraph-Cable Company. That on or about the 21st day of April, 1922, said Telegraph Company entered into a contract with the New York Cotton Exchange, which ever since that time and now is in full force and effect. That said contract is similar to that entered into on the 21st day of April, 1922, between the New York Cotton Exchange and the Western Union Telegraph Company, a copy of which contract is marked Exhibit A, and is annexed to the answer of the New York Cotton Exchange in the above suit. That in said contract with the Postal Telegraph-Cable Company it was provided that the New York Cotton Exchange, at its own cost, should collect and furnish its con-[fol. 84] tinuous quotations to the said Postal Telegraph-Cable Company, and that the said Telegraph Company might serve said quotations to all persons except those who might be, directly or indirectly, engaged in the promotion or maintenance of bucket shops, or other places where such continuous quotations are used as the basis of a bet or other illegal contracts based on the fluctuations of prices of cotton on said Exchange, but that said contract provides that said Telegraph Company should not under any circumstances, directly or indirectly, furnish said continuous quotations to any person, firm or corporation until such person, firm or corporation shall have signed, in duplicate, an application in writing, addressed to said Telegraph Company, substantially in the form attached to said contract, and until such application shall have been approved by the New York Cotton Exchange.

That deponent has charge of the furnishing of said continuous quotations to persons applying therefore, and has knowledge of those persons to whom the Postal Telegraph-Cable Company furnishes such continuous quotations, and that said Telegraph Company furnishes said continuous quotations only to those persons, firms or corporations whose applications have been approved by the New York Cotton Exchange, and said Telegraph Company has not, and does not, furnish said continuous quotations to the Odd-Lot Cotton Exchange of New York, the complainant in the above entitled suit.

Robert J. Hall.

Sworn to before me this 9th day of February, 1923. Harry Praeger, Notary Public, Bronx Co. No. 31. Cert. filed in N. Y. Co. No. 74. (Seal.)

[fol. 85] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF GARDNER IRVING

Gardner Irving, being duly sworn, says: That he is General Superintendent of the Commercial News Department of The Western Union Telegraph Company and is in charge and has general supervision of the furnishing of continuous quotations of The New York Cotton Exchange by The Western Union Telegraph Company and The Gold and Stock Telegraph Company in New York City and elsewhere; that said continuous quotations are furnished only to persons whose applications therefor have been approved by The New York Cotton Exchange, and that no such application of The Odd-Lot Cotton Exchange has been so approved by The New York Cotton Exchange; and that the continuous quotations of The New York Cotton Exchange are not furnished to The Odd-Lot Cotton Exchange by either The Western Union Telegraph Company or The [fol. 86] Gold and Stock Telegraph Company.

Gardner Irving.

Subscribed and sworn to before me this 9th day of February, 1923. C. A. Van Brunt, Notary Public, Kings County No. 15. Certificate filed in New York County No. 32. My commission expires March 30, 1924. (Seal.)

IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF THOMAS HALE

STATE OF NEW YORK,
Southern District of New York,
County of New York, ss:

Thomas Hale, being duly sworn, deposes and says that he is and has been for seven years last past Secretary of the New York Cotton [fol. 87] Exchange. That said Exchange keeps a permanent record of the quotations of prices at which contracts for the purchase and sale of cotton for future delivery are made upon said Exchange, and also a pemanent record of the time said quotations are made. That deponent has compared the quotations in the affidavit of George J. Burmeister, verified the 10th day of February, 1923, with the quotations in the record of the New York Cotton Exchange on the 5th day of February, 1923, and that said quotations in said Burmeister's affidavit correspond in prices and in their sequence with those thus kept in the permanent records of the New York Cotton Exchange,

except that the quotations in said Burmeister's affidavit, stated to have been posted on the Odd-Lot Cotton Exchange of New York, are a minute or two later than those recorded in the said records of the New York Cotton Exchange.

Thomas Hale.

Sworn to before me this 10th day of February, 1923. Harry Praeger, Notary Public, Bronx Co. No. 31. Cert. filed in N. Y. Co. No. 74. (Seal.)

[fol. 88] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF GEORGE J. BURMEISTER

STATE OF NEW YORK,
Southern District of New York,
County of New York, ss:

George J. Burmeister, being duly sworn, deposes and says:

I reside in Maywood, Illinois.

On February 5, 1923, I went to the Exchange Room of the Odd-Lot Cotton Exchange of New York, on the 11th floor of No. 115 Broad Street, Borough of Manhattan, New York City, about twenty minutes past two in the afternoon. There I met and talked with M. C. Smith, who told me that he was a member of M. C. Smith & Co., clearing members of said Odd-Lot Cotton Exchange, and went with him to the Exchange Room of said Odd-Lot Cotton Exchange, as aforesaid. In the course of my conversation with him, he in-[fol. 89] formed *be* that said Odd-Lot Cotton Exchange was obtaining continuous quotations of the New York Cotton Exchange. I also met there Albert C. Esposito, who informed me that he was a member of M. C. Smith & Co., and that said Odd-Lot Cotton Exchange was obtaining the continuous quotations of the New York Cotton Exchange. Mr. Esposito also informed me that if I would send some orders to his firm to make purchases or sales of cotton for future delivery on said Odd-Lot Cotton Exchange that I could feel assured that the prices at which my orders would be fulfilled would harmonize with the prices prevailing on the said New York Cotton Exchange.

I, Myself, saw a blackboard in the Room of the Odd-Lot Cotton Exchange, on one part of which was marked "New York Cotton," and on the other "Odd-Lot Cotton." On this blackboard, under the designation "New York Cotton" quotations of prices of cotton were being marked up all the time by a boy who was wearing a telephone receiving head-piece. This blackboard was also covered with quotations under the designation "New York Cotton." There were very few quotations under the designation "Odd-Lot Cotton." I copied from the quotations posted on this blackboard under the designation

"New York Cotton" the following quotations, which were posted on said blackboard on February 5, 1923, at the times set opposite each line of quotations:

2.35 p. m. March	2787	May	Cancel 2820,	2817, July 2763
2.45 p. m. March	2792	May		2819, July 2766
3.02 p. m. March	94		22	70
			23	68
	90		25	70
	92		23	67
	90		24	69
	91		22	
			20	
		Cancel	25	

[fol. 90] I left the Exchange floor about eight minutes past three on the afternoon of February 5, 1923. I have since compared said quotations with the official record of quotations of the New York Cotton Exchange of February 5, 1923, and they correspond in prices and in their sequences with the official quotations of said New York Cotton Exchange, except that the quotations posted on the blackboard of the Odd-Lot Cotton Exchange are recorded a minute or two later than the time shown on the official records of the New York Cotton Exchange.

George J. Burmeister.

Sworn to before me this 10th day of February, 1923. Harry Praeger, Notary Public, Bronx Co. No. 31. Cert. filed in N. Y. Co. No. 74. (Notarial Seal.)

[fol. 91] IN UNITED STATES DISTRICT COURT

[Title omitted]

REPLY TO ANSWER AND COUNTERCLAIM

The plaintiff for a reply to so much of the answer and counterclaims of the defendants in the above entitled cause, as plaintiff is advised, it is necessary for plaintiff to reply unto says:

First. Plaintiff denies each and every allegation contained in the seventh paragraph of the answer of the New York Cotton Exchange, beginning with the seventh line thereof and ending with the conclusion of said paragraph, and plaintiff states the fact to be that the plaintiff, the Odd-Lot Cotton Exchange, provides and maintains an Exchange for the regular legal and legitimate execution of orders for the purchase and sale of cotton for future delivery. That the said Exchange conforms to and complies with all legal requirements of the Federal Government, and of New York State in reference to [fol. 92] such transactions; that it requires of its members, the

strictest observance of said laws, and the transactions on said Exchange by the members thereof are bona fide and conducted in the main in the same manner as transactions on the defendant, New York Cotton Exchange, by the members thereof. That the members of the Odd-Lot Cotton Exchange engage in the real purchase and sale of cotton for future delivery, either for themselves or for their customers, that all transactions of plaintiff's members are conducted on the floor of the Exchange, and each and all of them reported to and cleared through the Clearing House of plaintiff, and that all orders received and transactions conducted by plaintiff's members for their customers, are with the bona fide intention of both parties that said transactions shall be completed by the actual delivery of cotton, and are in no case completed by settlement in the offices of plaintiff's members without delivery, and without being carried into actual transactions on plaintiff's Exchange; plaintiff specially denies that the transactions of its members are between them on the one side and the customers on the other and that the business so conducted is the business of a bucket shop; that the plaintiff's Exchange is not only not maintained as an aid to bucket shops, but its rules and regulations prohibit bucketing on the part of any of its members upon the penalty of expulsion, and these rules and regulations have been strictly adhered to and enforced.

Second. Replying to Paragraph Nineteenth of the answer of the defendant, New York Cotton Exchange, the plaintiff says that the Odd-Lot Cotton Exchange has never had and now has no connection [fol. 93] whatever, either directly or indirectly with the American Cotton Exchange. That as plaintiff is informed, those owning the assets of the American Cotton Exchange has formed a corporation for the purpose of conducting an Exchange based upon the assets and business of the American Cotton Exchange, but the plaintiff and its members have no interest therein or in connection therewith, either direct or remote. That the Odd-Lot Cotton Exchange is solely and entirely separate, independent and distinct from the American Cotton Exchange, and that it has in no manner succeeded to, or taken the place of the American Cotton Exchange. And defendant specially denies that many of the active members of the present Exchange were active members of the American Cotton Exchange, and plaintiff states the fact to be that of the one hundred members of the Odd-Lot Cotton Exchange, only three have ever had any active connection with the American Cotton Exchange, and this only as brokers. That these three members are reputable brokers, and were in no manner involved in the prosecution of the American Cotton Exchange. That they have not been charged with bucketing, and as members of the Odd-Lot Cotton Exchange, have conducted and are now conducting their business as brokers, strictly according to law, and in obedience to the rules and regulations of the Odd-Lot Cotton Exchange.

Reply to Counterclaim of Defendants

First. The plaintiff alleges and shows that the Court is without jurisdiction to hear and determine the counterclaim of the defendants, because:

[fol. 94] (a) The counterclaim alleged by defendants does not arise out of the transaction which is the subject matter of the suit.

(b) Because there is no such diversity of Citizenship alleged as between the plaintiff and defendants as to give the Court jurisdiction, the fact being that the defendants are each and all citizens of the State of New York, being corporations chartered, organized and operating under the laws of said State, while the plaintiff, Frank Moore, the President, and a great number of the members of the Odd-Lot Cotton Exchange, reside in and are citizens of the State of New York.

Second. By way of answer to defendants' counterclaim, the plaintiff denies that it is purloining the continuous quotations of the defendant, or is receiving them from some person who is purloining them.

That as is shown in the Fifteenth paragraph of the answer of the New York Cotton Exchange, at folio 39, the continuous cotton quotations of the New York Cotton Exchange are communicated to persons in all parts of the United States, within fifteen to twenty seconds after said prices are made on defendant's exchange. That as shown at folio 38 of said same paragraph of defendants' answer, the said quotations are transmitted to and are printed upon a roll of paper called a tape, so that persons in the offices of parties receiving same under contract with the Western Union, can read same on said tape operated upon a ticker furnished for said purpose. The fact is, that the said tickers receiving said quotations, and the said quotations immediately appearing upon said roll of paper, are publicly exposed in what is known as the board room of brokers, so that any [fol. 95] one of the general public may read same immediately when received, and that said quotations are immediately written in chalk on a large blackboard for the benefit of the public, and particularly those who wish to speculate and buy and sell cotton for delivery; so that at the expiration of the said fifteen or twenty seconds from the time said continuous quotations are promulgated or disseminated from the floor of the New York Cotton Exchange, they become public, and the New York Cotton Exchange and the Western Union Telegraph Company and the Gold & Stock Telegraph Company as well as the parties into whose offices said quotations came by means of said tickers and tapes lose all exclusive title to, and control over said quotations, and after—the general public have the right to use said quotations in any manner and for any purpose they may desire.

That the quotations as disseminated from the New York Cotton Exchange are not received or used by plaintiff and have not been

until after they have been disseminated by means of said tickers and tapes and from such persons as have acquired same from their publication upon said tickers and tapes as described in defendant's answer and after they have lost all secrecy and are open to the view of the general public.

Wherefore, the plaintiff prays that the defendant's counterclaim be dismissed, with costs.

John M. Coleman, Solicitor for Plaintiff.

Office & P. O. address, 29 Broadway, Borough of Manhattan, New York City.

[fol. 96] Jurat showing the foregoing was duly sworn to by Frank Moore; omitted in printing.

[fol. 97] In United States District Court

[Title omitted]

Affidavit of Henry H. Royce

State of New York,
Southern District of New York,
County of New York, ss:

Henry H. Royce, being duly sworn, deposes and says:

I am and have been for a number of years last past a member of the Board of Managers of New York Cotton Exchange, one of the defendants in the above entitled suit; I am and have been for more than two years last past Chairman of the Supervisory Committee of the New York Cotton Exchange; I am also and have been for several months last past a member of the Business Conduct Committee of the New York Cotton Exchange, of which I have been a member ever since its formation. I am familiar with the proceedings of each of [fol. 98] said Committees and attend their meetings. I have read the Twenty-seventh paragraph of the amended bill of complaint in the above entitled suit, and I deny that the Supervisory Committee or the Business Conduct Committee has ever directed any member of the New York Cotton Exchange to discontinue their business transactions with members of the Complainant or not to do business with members of the complainant. I am familiar with the rules of the New York Cotton Exchange and there is no rule of that Exchange which prohibits any of its members from doing business with any of the members of any other exchange.

Henry H. Royce.

Sworn to before me this 8th day of February, 1923. Harry Praeger, Notary Public, Bronx Co. No. 31. Cert. filed in N. Y. Co. No. 74. (Seal.)

[fol. 99] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER DENYING PLAINTIFF'S MOTION FOR INJUNCTION AND GRANTING DEFENDANTS' MOTION FOR PRELIMINARY INJUNCTION, AND NOTICE OF SETTLEMENT

This cause came on to be heard at this Term and was argued by John M. Coleman, of counsel for the complainant, and Henry W. Taft and Henry S. Robbins, of counsel for the defendants, and it appearing that complainant has made a motion for a preliminary injunction restraining defendants from refusing to furnish to complainant and the members of the Odd-Lot Cotton Exchange of New York the continuous cotton quotations of the New York Cotton Exchange, and defendants have made a motion for a preliminary injunction, as prayed for in their answers and counterclaims, enjoining complainant or the members, officers and agents, of the Odd-Lot Cot-[fol. 100] ton Exchange of New York from receiving, using or distributing the said continuous quotations of the New York Cotton Exchange, and it appearing to the satisfaction of the Court that complainant and the members of the said Odd-Lot Cotton Exchange of New York are now either purloining said continuous quotations of The New York Cotton Exchange or receiving them from some person who is purloining them and giving the same to complainant and the members of said Odd-Lot Cotton Exchange without the permission of the defendant, the New York Cotton Exchange, and that said unauthorized receipt and use of said quotations by complainant and the members of said Odd-Lot Cotton Exchange will seriously and irreparably impair the value of said continuous quotations of the New York Cotton Exchange and defeat the efforts of said Exchange to prevent the use of said quotations in bucket shops, and will materially and irreparably impair the right of said New York Cotton Exchange to derive a revenue from the distribution of said quotations unless said unauthorized receipt and use thereof is enjoined, and thereupon, upon consideration thereof, it was

Ordered, adjudged and decreed as follows:

First. That complainant's motion for a preliminary injunction be and the same hereby is in all respect denied.

Second. That defendants' motion for a preliminary injunction be and the same is hereby in all respects granted, and that complainant and each and every of the officers, members, agents, employees and [fol. 101] servants of the Odd-Lot Cotton Exchange of New York be and they hereby are enjoined and restrained from receiving, using, selling or distributing, directly or indirectly, the continuous quotations of New York Cotton Exchange, (meaning thereby all quotations wherein the price of cotton shall be quoted oftener than at intervals of fifteen minutes) or any of them, and from having, maintaining or permitting telegraph or other wires running into or through complainant's office or Exchange, over which said continuous quotations,

or any of them are passing, and complainant and the members of said Odd-Lot Cotton Exchange of New York be and hereby are restrained and enjoined from aiding, abetting or assisting, directly or indirectly, any member of said Odd-Lot Cotton Exchange, or any other person, firm or corporation in using, selling or distributing said continuous quotations, or any of them, until it, he or they shall have first lawfully acquired the right to receive said quotations, either by contract or purchase, from the New York Cotton Exchange, or with its consent and approval, from one of the Telegraph Companies authorized by it to distribute such quotations, and it is further

Ordered, adjudged and decreed that the defendants file an undertaking in the penal sum of Thirty Thousand dollars ($30,000.00), with a surety to be approved by the Clerk of this Court, conditioned upon the payment of such costs and damages to the complainant as may be suffered by him if he be found to have been wrongfully enjoined or restrained hereby.

Dated, New York, March 26th, 1923.

Learned Hand, United States District Judge.

[fol. 102] In United States District Court

[Title omitted]

Notice of Settlement

Please take notice, that the foregoing proposed order will be presented for settlement to Honorable Learned Hand, United States District Judge, at his Chambers, at No. 233 Broadway, in the Borough of Manhattan, City of New York, on the 24th day of March, 1923, at 10:30 o'clock in the forenoon.

Dated, New York, March 22nd, 1923.

Yours, etc., Cadwalader, Wickersham & Taft, Solicitors for Defendant New York Cotton Exchange. Office and Post Office Address: No. 40 Wall Street, New York City. Francis Raymond Stark, Solicitor for Defendant-, Western Union Telegraph Company and Gold and Stock Telegraph Company. Office and Post Office Address: No. 195 Broad-
[fol. 103] way, New York City.

To John M. Coleman, Esq., Solicitor for Complainant, 29 Broadway, Borough of Manhattan, New York City.

[fols. 104 & 105] Bond on injunction for $30,000 approved and filed March 27, 1923 omitted in printing.

[fol. 106] IN UNITED STATES DISTRICT COURT

[Title omitted]

OPINION

Motion for preliminary injunction upon a counterclaim in equity. The plaintiff opposes on the ground that the counterclaim is not within the jurisdiction of the District Court.

The bill is under the Anti-Trust laws. It alleges that the three defendants by contract in restraint of trade have refused the plaintiff "quotations" of cotton sales on the New York Cotton Exchange, by which alone the plaintiff can conduct its business of selling "odd-lots" of cotton bales, i. e., lots of less than one hundred bales. Such quotations are necessary to the conduct of the plaintiff's business since they represent the transactions taking place on the New York Cotton Exchange which fixes the market everywhere. The defendants furnish such quotations to all persons of whom they approve and deny the plaintiff that right in an effort to suppress competition.

The answer denies the purpose to suppress competition, but admits [fol. 107] that the defendants have refused to give the quotations to the plaintiff. This refusal they justify because the plaintiff is not engaged in honest business, but either "buckets" its customers' orders or transmits those orders to "bucket-shops" or both. The refusal arises from the defendants' desire to promote honest dealing in cotton. The counterclaim which is incorporated with the answer alleges that the plaintiff, not being able to get the quotations from the defendants either "purloins" the quotations from the defendants or gets them from one who does. When received it uses them for the purpose of "bucketing" orders or enabling "bucket-shops" to do so elsewhere. It asks an injunction against the plaintiff's continuation of this practice.

Henry W. Taft and Henry S. Robbins for the motion.

John M. Coleman opposed.

LEARNED HAND, D. J.:

Under Equity Rule 30 there would concededly be no objection to the counterclaim if substantive jurisdiction existed. However, there is not the necessary diversity of citizenship between the plaintiff and the defendants and therefore the counterclaim will lie only if ancillary to the main controversy, the Rule being incapable of extending the constitutional jurisdiction of the District Court. The question therefore is this: Is it necessary to a complete disposition of the subject matter of the bill and to the protection of the rights involved, if the defendants are correct that the counterclaim should be entertained? This is the result of the cases, Stillman vs. Combe, 197 U. S. 436, Raphael vs. Trask, 194 U. S. 272, Cleveland, etc., Co. vs. Galien, etc., Co., 243 Fed. R. 405, 407, Hoag vs. Hoag, 107 [fol. 108] Fed. R. 807, affirmed 154 Fed. R. 1003 (C. C. A. 2). The same reasoning lies at the basis of the common rule that when

a Court has custody of a res, it will enterain all controversies touching claims upon it. The case turns upon an analysis of the pleadings with an eye to this principle.

The bill rests upon a tort, the refusal of the defendants to furnish the quotations to the plaintiff in pursuance of an unlawful agreement to suppress competition. The right of the defendants to withhold its quotations for other reasons is necessarily conceded, but it has no right to make its refusal a step in a scheme to monopolize the business of dealing in cotton. The answer admits the refusal but denies that it is a step in any such agreement. It asserts the defendants' right to withhold the quotations from this plaintiff because of other reasons.

Thus if the defendants succeed, the decree will either expressly or by implication declare that the defendants have the right to withhold the quotations and that the plaintiff has no right to receive them. On the assumption that the defendants will succeed, the counterclaim asks that this right be protected from the plaintiff's tort of "purloining" the quotations from the defendants' customers. The counterclaim goes upon the legal hypothesis that when the defendants have given the quotations to a customer under agreement that he shall use them only for himself, it is a tort for another to use them in his own business. Whether or not they be right is not for the moment the question, but only whether that relief demanded in the counterclaim will be ancillary to a complete disposition of the controversy in the bill.

[fol. 109] It appears to me that it is. The defendants' whole defensive pleading is that they have the right to refuse the quotations, and that if they can establish it they should be immune in its enjoyment from unlawful attack by the plaintiff. The decree on the bill will establish their right against any attack by suit; that on the counterclaim against attack in pais. There is no reason, if the defendants can establish their right by the decree, why the plaintiff should not be forbidden from impairing the values of the decree by tortious interference. A decree under the counterclaim would do no more than secure to the defendant the complete enjoyment of a decree on the bill. It is in every sense ancillary to a complete disposition of the original controversy. Therefore, it is not necessary that there should be any independent Federal jurisdiction.

Thus the question arises on the merits. The defendants' affidavits show reason to assume that the plaintiff has been copying, or causing to be copied, the quotations from blackboards of the defendants' customers and these affidavits are unanswered. If so, the cases support the defendants in their position, Board of Trade vs. Christie Grain & Stock Co., 198 U. S. 236, M'Dermott Com. Co. vs. Board of Trade, 146 Fed. R. 961 (C. C. A. 9), Board of Trade vs. Price, 213 Fed. R. 336 (C. C. A. 8).

Therefore the defendants are entitled on this showing to an injunction forbidding the plaintiff from taking their quotations for distribution among its customers. This protects the status quo until

after hearing it can be determined whether the defendants are engaged in an unlawful conspiracy.

Motion granted.

March 17, 1923.

Learned Hand, D. J.

[fol. 110] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR AND ORDER ALLOWING APPEAL

The plaintiff herein, Frank More, President of the Odd-Lot Cotton Exchange of New York, feeling aggrieved by the order made and entered herein in the above entitled cause, on the 26th day of March, 1923, denying the plaintiffs' motion for an injunction against the defendants, and granting the motion of the defendants for an injunction against the plaintiff, does hereby appeal from the said orders, and from the whole and every part thereof to the United States Circuit Court of Appeals, for the Second Circuit, for the reason set forth in the assignment of errors filed herein, and he prays that his appeal be allowed, and that citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said orders were based, duly authenticated, be sent to the [fol. 111] United States Circuit Court of Appeals, for the Second Circuit, under the rules of such Court in such cases made and provided, and your Petitioner further prays that the proper order relating to the required security to be required of him, be made, and that such orders and injunction be stayed until the further order of the said Court of Appeals be made herein.

John M. Coleman, Solicitor for the Appellant, Frank Moore, President of the Odd-Lot Cotton Exchange Co. of New York.

The foregoing petition for appeal is allowed and the order granting the injunction is hereby stayed upon plaintiff giving bond as required by law for the sum of five thousand ($5,000) dollars, said stay to continue until said appeal is heard and determined, provided the transcript on appeal is filed on or before the first day of May, 1923, and provided said appeal is promptly prosecuted.

Dated, New York, April 16th, 1923.

Learned Hand, Judge, U. S. D. C.

[fol. 112] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS

Now comes the Appellant, Frank Moore, President of the Odd-Lot Cotton Exchange of New York, plaintiff in the above styled cause, and files the following assignments of error upon which he will rely upon the prosecution of the appeal in the above entitled cause from the order made by this Honorable Court, on the 24th day of March, 1923, denying the plaintiff's motion for an injunction against the defendants, and from such order granting the motion of the defendants for an injunction against the plaintiff.

I

The Court erred in denying the plaintiff's motion for an injunction against all of the defendants, because the plaintiff's allegations that the New York Cotton Exchange had monopolized the business of making and selling continuous quotations, and were therefore [fol. 113] legally bound to supply such quotations without discrimination to all applicants for such quotations who complied with the regulations of the defendant, the New York Cotton Exchange, by offering to sign the usual form contract and offering to pay the usual price therefor, and that the plaintiff had shown his offer to comply with all such conditions, and which the defendants do not deny.

II

The Court erred in refusing to grant the plaintiff's motion for an injunction, because the complaint herein shows that the defendant, The New York Cotton Exchange, and the defendants, The Western Union Telegraph Co., and the Gold Stock Telegraph Co., had entered into a conspiracy, and were actually carrying out the conspiracy to suppress competition and Interstate Commerce, and to interfere with commerce in cotton, and in carrying out such conspiracy to unfairly discriminate against this plaintiff in favor of others dealing and trading in cotton by and with the use of the continuous quotations made and issued by the New York Cotton Exchange.

III

The Court erred in denying the plaintiff's motion for an injunction, because the defendants, The Western Union Telegraph Co. and The Gold & Stock Telegraph Co., are public service corporations, and as such are, as a part of their corporate business, engaged in obtaining and gathering news and information regarding the cotton [fol. 114] production in the United States, and transmitting the same to customers, and gather and obtain quotations of the market prices and sales of cotton, and they transmit, distribute and sell such

quotations, and were therefore bound legally to transmit, deliver and sell such continuous cotton quotations to all persons demanding the same upon like terms and conditions, and without discrimination, and that this plaintiff had requested such service and offered to comply with all of the conditions and terms imposed by the said defendants Telegraph Companies.

IV

The Court erred in denying the plaintiff's motion for an injunction, on the ground that the plaintiff's were engaged in a bucket shop business in violation of law, because the defendants' charge was merely based on information and belief, and the plaintiffs fully denied the conclusions and opinions so alleged, and completely denied the defendants' equity upon that ground, and further, because the said defendants Telegraph Companies being public service corporations, had no power or authority to discriminate and to base such discrimination upon the claim that the plaintiff desired to use such information for an unlawful purpose.

V

The Court erred in denying the plaintiff's motion for an injunction, on the ground that the plaintiffs Telegraph Companies had obtained or purchased their said quotations from the New York Stock Exchange on condition that it should discriminate against pro-[fol. 115] posed purchasers of such quotations at the instigation and direction of the New York Cotton Exchange, and therefore the contract entered into between the said Telegraph Companies and the said New York Cotton Exchange, limiting the Telegraph Companies' right to serve the public without restriction, and upon like terms, was void, as a violation of the Telegraph Companies' charter obligation, and was contrary to public policy.

VI

The Court erred in granting the motion of the defendants on their counterclaim, and granting an injunction against the plaintiffs herein, because the Court was without jurisdiction to entertain such counterclaim for want of diversity of citizenship, the said counterclaim not having arisen out of the transaction sued upon, but was merely the subject of an independent suit in equity.

VII

The Court erred in granting the defendant's motion for an injunction and granting the injunction against the plaintiffs herein, on the ground that the plaintiffs were purloining the defendants' quotations, because the defendants offered no proof of any facts to sustain such allegations, but merely alleged such facts upon information and

belief, and such allegations on information and belief were fully denied by the plaintiff.

Therefore, the appellant prays that the said order denying the plaintiff's motion for an injunction be reversed, and that the plaintiff herein be granted the injunction as prayed for, and that the [fols. 116 & 117] order granting the defendants' motion for an injunction against the plaintiffs, be reversed and that the defendants' motion for such injunction be denied, and for such other relief as the appellant may be entitled to in the premises.

John M. Coleman, Solicitor for the Appellant, Frank Moore, President of the Odd-Lot Cotton Exchange of New York.

CITATION—In usual form; omitted in printing

[fols. 118 & 119] BOND ON STAY OF INJUNCTION FOR $5,000—Approved and filed April 13, 1923; omitted in printing

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[fol. 120] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION RE TRANSCRIPT OF RECORD

It is hereby stipulated and agreed that the forego-ng transcript on appeal is a true transcript of the record in the said District Court in the above entitled case, as agreed upon by the parties hereto.

Dated, New York, April 30th, 1923.

John M. Coleman, Solicitor for Complainant. Cadwalader, Wickersham & Taft, Solicitors for the Defendant New York Coton Exchange. Francis Raymond Stark, Solicitor for Defendant- The Western Union Telegraph Co. and The Gold & Stock Telegraph Co.

[fol. 121] IN UNITED STATES DISTRICT COURT

[Title omitted]

CLERK'S CERTIFICATE

I, Alex. Gilchrist, Jr., Clerk of the District Court of the United States for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above entitled case, as agreed upon by the parties.

In testimony whereof, I have caused the seal of said Court to be hereunto affixed at the City of New York, in the Southern District of New York, this 30th day of April, in the year of Our Lord one thousand nine hundred and twenty-three, and of the Independence of the said United States the one hundred and forty-seventh.

Alex. Gilchrist, Jr., Clerk of the District Court of the United States, Southern District of New York.

[fol. 122] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1923

No. 40

Argued October 16, 1923. Decided December 17, 1923

FRANK MOORE, President of the Odd-Lot Cotton Exchange of New York, Complainant,

v.

THE NEW YORK COTTON EXCHANGE, THE WESTERN UNION TELEGRAPH Co., and The Gold & Stock Telegraph Co., Defendants-Appellees; Frank Moore, President of the Odd-Lot Cotton Exchange of New York, Appellant

Appeal from the District Court of the United States for the Southern District of New York

Before Rogers, Manton and Mayer, Circuit Judges

OPINION

Cadwalader, Wickersham & Taft, for Appellee, New York Cotton Exchange.

Henry W. Taft, Henry S. Robbins, George Coggill, of Counsel.

[fol. 123] Francis R. Stark, for Appellees—The Western Union Telegraph Company and the Gold & Stock Telegraph Company.

John M. Coleman, for Appellant.

Oscar B. Bergstrom, of Counsel.

This cause comes here on appeal from the United States District Court for the Southern District of New York.

The Odd-Lot Cotton Exchange, for whose benefit and that of its members this action was brought is an unincorporated association organized and operating under the laws of the State of New York. Its President is authorized by the Laws of that State to bring suits in his own name on its and its members behalf. It has a membership of 100 or more and maintains an Exchange in the City of New York wherein its members buy and sell cotton for future delivery without limit as to quantity, except that no lot bought or sold shall be less

than 10 bales, nor more than 100 bales. It is otherwise unlimited as to the quantity dealt in.

The New York Cotton Exchange is a corporation created by special legislative enactment of the State of New York. It has a membership of more than 400 and maintains an Exchange in the City of New York for the purchase, sale and exchange of cotton, and to facilitate dealings and transactions in that commodity, and to diffuse information as to prices, quotations and such other matters as relate to the trade and business of dealing in said commodity. It is unlimited as to the quantity of cotton dealt in except that no lot shall be less than 100 bales.

The Western Union Telegraph Company is also a New York corporation and it has its principal office in the City of New York. It is a public service corporation engaged in interstate commerce by transmitting messages by means of telegraph and cable wires between [fol. 124] the various States and Territories of the United States, and between such States and Territories and Foreign Countries.

The Gold & Stock Telegraph Company is also a New York corporation and it likewise has its principal office in the City of New York. It also is engaged in interstate commerce and in disseminating market news and the continuous and instant quotations of cotton prices by means of ticker service located in Exchanges and Brokerage Houses and with cotton dealers throughout the United States.

This suit was brought for a violation of the Anti-Trust Laws of the United States.

It is alleged that the Odd-Lot Cotton Exchange opened its Exchange in New York City in August, 1922. And that in order to serve promptly and efficiently its members, brokers and customers it is necessary that it have what is known as a continuous ticker service owned and operated by defendants, The Western Union Telegraph Co. and the Gold & Stock Telegraph Co., and in order to procure same, complainant made application, as is required by the said two companies for said ticker service, said application being dated on or about July 1, 1922, and being the printed application required by defendants to be signed by all applicants for their continuous quotations as set forth in the contract between the New York Cotton Exchange and the Western Union Telegraph Company. In making its application it alleges that it was then able, willing and offered to pay whatever charges might be made and exacted therefor and to comply with all requirements of defendants, and is now ready, able and willing and offers to pay said charges, and to comply with all requirements of defendants. That at the time when it made its application to the Manager of the Western Union Telegraph Company, its representative was informed that said application could not be granted, except upon the express consent of the New York Cotton [fol. 125] Exchange. That since the making of said application, the said Western Union Telegraph Company and the Gold & Stock Telegraph Company have failed and refused to install a ticker for the use of complainant giving continuous cotton quotations, as called for in the application, and the New York Cotton Exchange has failed

and refused to give its consent to the installation of said ticker service for continuous cotton quotations.

The amended bill of complaint is of great length covering more than 20 printed pages. It is not necessary for present purposes to set forth its various allegations. But it is alleged that by reason of various matters which are set forth the "New York Cotton Exchange can and does influence and control all dealing, trading and commerce in cotton in the United States and to a large extent in foreign countries and therefore has thereby monopolized the cotton commerce in the United States, and that the free competitive flow of Interstate Commerce in such product is hampered, restrained and monopolized by the said defendants."

It is also alleged that "The New York Cotton Exchange is a monopoly, having complete domination and control of the cotton market for the purchase and sale for future delivery, as hereinbefore alleged; that it has complete control over the receipt and dissemination of the market quotations from foreign markets, and of the establishment and dissemination of the quotations in the City of New York, and of the manner, and to whom, same may be disseminated from the City of New York and to other Exchanges in the United States."

It is further alleged that the contract "hereinbefore alleged between the New York Cotton Exchange and the Western Union Telegraph Co. and the Gold & Stock Telegraph Co. is in restraint of trade and commerce among the several states, and was made and entered into pursuant to a conspiracy on the part of the New York Cotton Ex-[fol. 126] change and its members, constituting said exchange, in restraint of trade and commerce among the states."

It is further alleged that the "contract between the New York Cotton Exchange and the Western Union Telegraph Company and the Gold & Stock Telegraph Company, and the refusal of the New York Cotton Exchange to allow the Odd-Lot Cotton Exchange of New York to install a cotton ticker, and have the continuous cotton quotations, while allowing same to is competitors as hereinbefore alleged, constitute an unfair method of competition in commerce contrary to the acts of Congress in such cases made and provided."

The Amended Bill of Complaint asked a decree:

1. Adjudging the New York Cotton Exchange to be a monopoly.

2. That the contract existing between the defendants be cancelled and declared void, concerning the installation of tickers and the giving of continuous cotton quotations.

3. That the defendants be perpetually restrained from carrying out the said contract, and be restrained from refusing to install in the exchange of the Odd-Lot Cotton Exchange of New York a ticker for the purpose of receiving continuous cotton quotations, and from further refusing to give and disseminate to the Odd-Lot Cotton Exchange of New York, and its members, the continuous cotton quotations, the same as is furnished to and disseminated by the New

York Cotton Exchange, through the said two telegraph companies, defendants, to other exchanges, individuals, corporations and brokers.

4. That the New York Cotton Exchange, its agents, servants, officers, attorneys and legal representatives, be further enjoined from [fol. 127] in any manner discriminating against the Odd-Lot Cotton Exchange of New York, or any of the members thereof, and that it be enjoined from instructing its members not to deal with the members of the Odd-Lot Cotton Exchange of New York, and from refusing to allow its said members to so deal, and from refusing to allow its members to furnish to the members of the Odd-Lot Cotton Exchange, with whom they deal, the cotton quotations, continuous and otherwise, as may be requested from time to time by the members of the Odd-Lot Cotton Exchange for their use in their transactions with members of the New York Cotton Exchange.

The defendants in their answers admitted that they have refused to install a ticker in complainant's Exchange to supply it with continuous quotations. They also admit that they have entered into a contract by which the Western Union Telegraph Company is allowed to furnish the quotations of the New York Cotton Exchange to anyone of whom said Exchange approves but deny that the purpose or effect of the contract is to restrain trade or commerce or prevent competition. The New York Cotton Exchange also alleges that when it received the application of the complainant for a ticker it made a careful investigation of the character and purposes of appellant and of its members and found that it had been organized to succeed the American Cotton Exchange; that many of the active members of the appellant Exchange had been active members of the American Cotton Exchange, which had been convicted in the Supreme Court of the State of New York of conducting a bucket shop under Sections 390 and 393 of the Penal Law; that the Odd-Lot Exchange was organized for the purpose of permitting its members to conduct bucket shops under the guise of being members of an Exchange; that for this reason the New York Cotton Exchange re- [fol. 128] fused to permit its quotations to be furnished to appellant and for the further reason that there is no commercial necessity or reason for the existence of a cotton exchange such as appellant's, whereon contracts for the future delivery of cotton in less than 100-bale lots are made and that such an exchange is conducive to improper speculation by persons of small means and inadequate knowledge.

The New York Cotton Exchange also asserted in its answer that it had the lengal right to safeguard its quotations and to refuse to give them to any person who, in its opinion, would not safeguard them or would misue them or give them to others who would use them for the purpose of promoting bucket shops or improper speculation and that, upon the question whether any applicant for the quotations desired them for an improper purpose, the judgment of the New York Cotton Exchange was final and not subject to judicial review.

All of the defendants set up as a defense and counter claim in their answers that, although the complainant had been refused permission to use the continuous quotations of the New York Cotton Exchange it was either purloining the quotations of the defendants or receiving them from some person who is purloining them, and is giving the same to its members, who in turn are distributing them over telegraph wires to many offices in the Southern States, wherein bucket shops are conducted, and wherein said quotations are displayed on blackboards for the purpose of promoting the conduct of said bucket shops, and that the unauthorized receipt and use of said quotations by said complainant and its members is calculated to and in time will, if not entirely stopped, seriously impair the value of the defendants' quotations and ultimately entirely defeat the efforts of the defendants to prevent the use of such quotations in bucket shops as a basis of illegal bets, and will also materially impair the right of the defendants to derive a revenue from the distribution of the quotations.

[fol. 129] The defendants prayed that an injunction might issue restraining the Odd-Lot Cotton Exchange, its officers, agents, employees and servants from receiving, using, selling, or distributing, directly or indirectly, the quotations of the New York Cotton Exchange, or any of them, and from having, maintaining or permitting any telegraph or other wire running into or through its office or exchange, over which said quotations, or any of them, are passing and from aiding, abetting or assisting directly or indirectly, any member of the Odd-Lot Cotton Exchange, or any other person, firm or corporation, in the City of New York, in selling or distributing said quotations or any of them, until it, he or they shall have first lawfully acquired the right to receive said quotations, either by contract from the New York Cotton Exchange or, with its consent and approval, from one of the Telegraph Companies authorized by said New York Cotton Exchange to distribute such quotations.

After answer the complainant moved the Court for a preliminary injunction restraining the defendants from refusing to furnish to it and its members the continuous cotton quotations of the New York Cotton Exchange. The defendants also moved for a preliminary injunction enjoining the complainant.

The motions for the injunctions were heard on the bill, answers and affidavits.

The District Court denied the complainant's motion for an injunction, and granted the motion of the defendants upon the defendants filing a bond in the sum of $30,000 conditioned upon the payment of such costs and damages to the complainant as might be suffered by it if it be found to have been wrongfully enjoined. From the order, entered on March 26, 1923, denying the complainant's motion for an injunction and granting the motion of the defendants for an injunction against the complainant, the latter appealed to this Court.

[fol. 130] Rogers, Circuit Judge (after stating the above facts):

It appears that the New York Cotton Exchange provides an Exchange Room in the City of New York where its members meet and make contracts for themselves or as brokers for customers, for the purchase and sale of cotton for future deliveries. Their transactions aggregate many million bales of cotton annually. The contracts are made on the Exchange between 10 A. M. and 3 P. M. by open viva voce bidding. It claims that the knowledge of the prices upon which these contracts are based constitute a peculiar kind of property and that their value depends on the right to confine the distribution of the quotations to such Telegraph Companies as will contract with the Exchange therefor and to such customers as will agree with the Telegraph Companies and the Exchange not to furnish them to others. The Western Union Telegraph Company pays to the Exchange annually a considerable sum of money for the privilege of receiving these quotations and distributing them to those customers of whom the Exchange approves. If any person can promptly acquire these quotations, surreptitiously, and without paying therefor and can give them out to others, the Telegraph Companies would be put at a disadvantage in competing with such persons and would no longer be willing to pay to New York Cotton Exchange the annual sum now paid to it for the privilege of receiving these quotations.

The complainant does not challenge the claim of the Cotton Exchange that it has a property right in the quotations. Indeed its right to come into equity for the relief which it seeks assumes that the quotations constitute a species of property. It is that upon which the jurisdiction of equity depends, as courts of equity are concerned only in the protection of property rights. And the right to acquire property is as much entitled to protection as the right to protect [fol. 131] property already acquired. International News Service v. The Associated Press, 205 U. S., 215, 236. And in Board of Trade v. Christie Grain and Stock Co., 198 U. S., 236, 250, the Supreme Court held that quotations of prices or dealings upon a board of trade communicated on confidential terms to numerous persons under a contract not to make them public were entitled to the protection of the law. And see Hunt v. New York Cotton Exchange, 205 U. S., 322.

But all the parties to this suit are citizens of the State of New York, so that the jurisdiction of the Court in this case does not rest upon diversity of citizenship. If jurisdiction of the bill exists it must be because the acts complained of therein violate the Federal Anti-Trust Laws.

It is plain that the bill cannot be maintained under the Federal Trade Commission Act of 1914 (38 Stat., 717). That Acts declares that unfair methods of competition in commerce are unlawful and the Commission is empowered to prevent persons, partnerships or corporations, with certain exceptions, from using such methods of competition. But as the only relief that Act provides is before the Federal Trade Commission it affords no support whatever for the bill now before us.

The Sherman Act to protect trade and commerce against unlawful restraints and monopolies, being the Act of July 2, 1890, invested the District Courts with jurisdiction to protect trade and commerce against unlawful restraints and monopolies. That Act made it the duty of the several district attorneys in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain violations of the Act. It did not authorize a suit by an individual or corporation for injunctive relief in a Federal Court. It affords no support, therefore, for this suit.

But the Act of October 15, 1914, known as the Clayton Act, in Section 16, provided that any person, firm, corporation, or association, shall be entitled to sue for and have injunctive relief in any court [fol. 132] of the United States having jurisdiction over the parties against threatened loss or damage by a violation of the anti-trust laws when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity under the rules governing such proceedings, 38 St. Part 1, Ch. 323, page 737. And it has been held in General Investment Company v. Lake Shore & Michigan Southern Railway Company, 260 U. S., 261, 287, that the right to sue thus given is to be exercised only in "a court of the United States." It cannot be asserted in a State court.

The Sherman Anti-Trust Act provides as follows:

"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. * * *

Section 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, * * * shall be deemed guilty of a misdemeanor * * *" 26 Stat., 209.

So that the question which we have to determine is whether the contract which the New York Cotton Exchange has made with the Western Union Telegraph Company, respecting the quotations on the Exchange, is a contract in restraint of trade or commerce, or whether there is shown on the part of the defendants or any of them a monopoly or an attempt to monopolize any part of interstate commerce.

The Supreme Court in Standard Oil Company v. United States, 221 U. S., 1, and in United States v. American Tobacco Co., 221 U. S., [fol. 133] 106, construed the Anti-Trust Act as prohibiting only contracts or acts which were unreasonably restrictive of competitive conditions and in the case last cited the Court quoted approvingly from the opinion in the Joint Traffic Case, 171 U. S., 568, the statement that "The Act of Congress must have a reasonable construction, or else there would scarcely be an agreement or contract, among business men that could not be said to have, indirectly or remotely, some bearing on interstate commerce, and possibly to restrain it."

As construed by the Supreme Court in the cases cited and in those about to be cited the Sherman Act is not construed as forbidding or restraining the power to make normal and usual contracts to further trade by restoring to all normal methods, whether by agreement or otherwise, to accomplish such purpose. And see United States v. Union Pacific R. R. Co., 226 U. S., 61; United States v. Reading Co., 226 U. S., 324; Nash v. United States, 229 U. S., 373; Eastern States Lumber Association v. United States, 234 U. S., 600.

The cases disclose that where the facts clearly show that the purpose of a contract is not to regulate, obstruct or restrain interstate commerce, but that the object is properly and fairly to regulate the transaction of the business in which the parties to it are engaged, the agreement will be upheld as not within the Statute. The contract is good if "it can be seen that the character and terms of the agreement are well calculated to attain the purpose for which it was formed, and where the effect of its formation and enforcement upon interstate trade or commerce is in any event but indirect and incidental, and not its purpose or object." Anderson v. United States, 171 U. S., 604.

And the record in this case discloses that the intention and purpose of the parties in making the contract which the complainant attacks in this suit was a proper and legitimate one. Prior to 1903 the Telegraph Companies were at liberty to gather quotations in [fol. 134] the Exchange Room and to sell them to any one desiring them. The only motive of the Telegraph Companies was profit, and the more customers the greater the profit. But it is said this resulted in the creation of many bucket shops throughout the country, where the quotations were posted on a blackboard and the keeper of the bucket shop accepted all offers of persons resorting to his place to bet on the fluctuations of prices as indicated by such quotations, these alleged trades or bets being opened at the last price on the blackboard and being closed when the blackboard price reached a point where the customer's margins became exhausted, or where prior thereto the customer desired to close his trade at the last named price thus essential to the conduct of such business. The use by these institutions throughout the country of these quotations necessarily brought the New York Cotton Exchange and other regular exchanges into discredit with the public it being supposed, from the presence of these quotations, that these bucket shops were in some way connected with these exchanges. To correct this condition and suppress these gambling places, so far as they were operating on its quotations, the New York Cotton Exchange made a contract in 1903, requiring the Telegraph Companies—in order to acquire the quotations—to enter into a contract with the Exchange substantially in the form of the contract herein involved. The purpose was, so it is said, to confine the distribution of the quotations to those desiring them for lawful purposes, and to thereby exclude their being given to persons who would not carefully safeguard them and confine them to their own offices. To the success of this purpose, it was essential that the quotations should be kept,

not only from the bucket shops themselves, but from all persons who should acquire them for the purpose of surreptitiously re-transmitting them to bucket shops. To this end, the contract provided for a written application to be signed by each person desiring the [fol. 135] quotations, in which he should agree with the Exchange and the Telegraph Companies, not only that the applicant would not himself use the quotations in conducting a bucket shop, but that he would confine the quotations to his own office and not permit them to be communicated therefrom.

This plan to prevent the misuse of quotations necessarily imposed, either upon the Exchange or the distributing Telegraph Company, the burden of determining the character and purpose of each applicant for the quotations. The Telegraph Company had no pecuniary interest in restricting the number of its customers for quotations. The only person having a real interest in preventing the misuse of the quotations was the Exchange itself, and the contract conferred upon the Exchange the right and duty to pass upon the character and purpose of each applicant and makes its decision final by providing that the Telegraph Company should not furnish the quotations to anyone whose application was disapproved by the Exchange.

It cannot be said that the contract involved was entered into for the purpose of restraining trade or of creating a monopoly. It appears to us that its purpose was that of properly regulating the transaction of the New York Cotton Exchange and of preventing the misuse of its quotations. It is not a contract in restraint of trade or commerce within the meaning of Section 1 of the Sherman Act as construed by the Supreme Court. Neither is it an attempt to monopolize trade or commerce among the several States within the meaning of Section 2 of the Sherman Act.

The New York Cotton Exchange has the property right in the quotations which it collects. As such owner the Exchange is under no legal duty to sell its quotations to any particular person nor to all because it sells to some. These quotations relate solely to the business of the Exchange which is under no obligation to communicate them. [fol. 136] and the Telegraph Company, as its agent, communicates them to those persons to whom the Exchange permits the communication to be made. In this we see no illegality. Whitwell v. Continental Tobacco Co., 125 Fed., 454; Matter of Renville, 46 App. Div. (N. Y.), 27. So far as the contract limits the right of the Telegraph Company to communicate the quotations to such persons as the Exchange approves we are unable to distinguish this case from that of Board of Trade v. Christie Company, 198 U. S., 236. That case involved a contract made by the Chicago Board of Trade with the Telegraph Companies for the distribution of its quotations. The Supreme Court held that contracts under which the Board of Trade furnished the telegraph companies with its quotations, on condition that they would only be distributed to persons in contractual relations with, and approved by the Board, and not to what are known as bucket shops, were not void as being in restrain of trade, either at common law or under the Anti-Trust Act. The Court held the Board of Trade was entitled to an injunction enjoining the de-

fendants from using and distributing the continuous quotations of prices on sales of grain and provisions for future delivery, and which the defendant could not obtain except through a known breach of the confidential terms on which the plaintiff communicated them.

The complainant asks a mandatory injunction compelling the defendants to furnish to it the continuous quotations of prices of contracts for the future delivery of cotton made on the New York Cotton Exchange. The transactions in which the latter Exchange is engaged and in which the complainant itself is engaged constitute, it is claimed, interstate commerce. The bill alleges that the purchases and sales made on the Exchange "constitute a large and important part of the interstate commerce as between said cotton growing States and other States, including the State of New York. That in addition to the said interstate sales and purchase as alleged for delivery from [fol. 137] said States, through and into many States of the United States, and into the State of New York, the said interstate commerce involves the interstate shipments and transportation of said commodity, through and from said cotton growing States, to the State of New York whence it is consigned and shipped to other cotton markets of the United States and Foreign Countries for manufacture." The contracts made on the New York Cotton Exchange are made in the Board Room of the Exchange in the City of New York and they provide that the cotton is deliverable from licensed warehouses in the Port of New York. Performance of the contract is made by the delivery of negotiable warehouse receipts issued by licensed warehouses in New York. There is no obligation to make delivery at any place except in the Port of New York. Such a transaction is local in its character and does not involve interstate commerce. The decisions of the Supreme Court make this clear. In Hopkins v. United States, 171 U. S., 578, it was held that the Kansas City Live Stock Exchange was not engaged in interstate commerce under the following circumstances: It received consignments of cattle from owners in other States upon an understanding that they should be sold and the net amount realized on the sale returned to the owners. In its opinion the Court said:

"* * * it is immaterial over how many States the defendants may themselves or by their agents travel in order to thereby secure the business. They do not purchase the cattle themselves; they do not transport them. They receive them at Kansas City, and the complaint made is in regard to the agreements for charges for the services at that point in selling the cattle for the owner. Thus everything at last centres at the market at Kansas City, and the charges are for services there, and there only, performed.

The selling of an article at its destination, which has been sent [fol. 138] from another State, while it may be regarded as an interstate sale and one which the importer was entitled to make, yet the services of the individual employed at the place where the article is sold are not so connected with the subject sold as to make them a portion of interstate commerce, and a combination in regard to the amount to be charged for such service is not, therefore, a com-

bination in restraint of that trade or commerce. Granting that the cattle themselves, because coming from another State, are articles of interstate commerce, yet it does not therefore follow that before their sale all persons preforming services in any way connected with them are themselves engaged in that commerce, or that their agreements among each other relative to the compensation to be charged for their services are void as agreements made in restraint of interstate trade."

There are other decisions of that Court which assert a like doctrine. See Anderson v. United States, 171 U. S., 604; Ware & Leland v. Mobile County, 209 U. S. 405, 413; Hill v. Wallace, 259 U. S., 44.

The complainant relies upon Board of Trade of the City of Chicago v. Olsen, 262 U. S., 1. That case involved an appeal from a decree which dismissed a bill in equity brought by the Board of Trade to enjoin certain United States officials from taking steps to enforce the Act of Congress of September 21, 1922, known as the Grain Futures Act, the constitutionality of which Act was directly involved. That case is not distinguishable in principle from that of Stafford v. Wallace, 258 U. S., 495, which involved the constitutionality of the Packers and Stockyards Act of 1921. In neither case has the Court overruled the cases heretofore cited in this opinion in which sales on the Exchange were regarded as transactions in [fol. 139] intrastate commerce and not in interstate commerce. It sustained the right of Congress to regulate in the one case the boards of trade and in the other the various stockyards of the country as great national public utilities. The Acts involved assumed that the corporations regulated by the Acts conducted a business affected by a public use of a national character and that they were therefore subject to national regulation. These cases show that the power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter. We find another illustration of the principle in the Transportation Act of 1920 which authorizes supervision by the Interstate Commerce Commission of intrastate commerce where it is so carried on as to favor persons or localities in intrastate commerce as against those in interstate commerce. See Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy R. R. Co., 257 U. S., 563; The Minnesota Rate Cases, 230 U. S., 352, 399.

But we find nothing in Stafford v. Wallace, supra, or in Chicago Board of Trade v. Olsen, or in any decision of the Supreme Court which supports the complainant's contention that the New York Cotton Exchange is engaged in interstate commerce. Neither are we cited to any Act of Congress which entitles the complainant to maintain its bill. And we conclude that the bill itself must be dismissed, ~~the District Court being without jurisdiction to entertain it.~~

Equity Rule 30 (198 Fed., XXVI), permits the defendant in his answer to "State in short and simple form any counter-claim arising out of the transaction which is the subject matter of the suit, and may without cross-bill set out any set-off or counter-claim against

the plaintiff which might be the subject of an independent suit in equity against him, and such set-off or counter-claim, so set up, shall have the same effect as a cross-suit, so as to enable the court to [fol. 140] pronounce a final judgment in the same suit both on the original and cross-claims." Under this rule if defendant has an independent cause of action in equity against the plaintiff he may counter-claim it. And a counter-claim so pleaded being in effect a "cross-suit" is not affected by a decree dismissing the bill on the merits. Buffalo Specialty Co. v. Vancleef, 217 Fed., 91.

The counter-claim sets up a cause of action within the jurisdiction of the District Court as a court of equity and within its jurisdiction as a federal court. On the dismissal of the complainant's bill the counter-claim in this suit is entitled to be treated as an original bill within the rule laid down by this court in Vidal v. South American Securities Co., 276 Fed., 855, 875, and the authorities there cited. It has frequently been said to be the general rule that the dismissal of the original bill carries with it a cross-bill. United States v. California &c. Land Co., 192 U. S., 355; Dows v. Chicago, 11 Wall., 108; Cross v. De Valle, 1 Wall., 1; Ulman v. Iaeger, 155 Fed., 1011; Markell v. Kesson, 31 Fed., 104; Glos v. Peo, 259 Ill., 332; Bell v. McLaughlin, 183 Ala., 548. But it is generally recognized that the dismissal of the original bill does not necessarily carry with it a cross-bill. Whether it has that effect depends upon whether the cross-bill is defensive merely or sets up new facts and prays for affirmative relief against the plaintiffs in the original bill and shows grounds for equitable relief which may uphold the jurisdiction of the court independent of the original bill, 21 C. J., 514.

Where, as here, the bill and the counter-claim relate to the same subject matter, it is quite immaterial that in the case of a cross-bill, and the same principle applies to a counter-claim, the parties thereto are citizens of the same State, and no diversity of citizenship exists. The cross-bill and the original suit are but one cause, and jurisdiction of the latter includes the former. If the court has jurisdiction [fol. 141] of the original bill it has jurisdiction of the cross-bill without reference to the citizenship of the parties, and the cross-bill need not disclose grounds of federal jurisdiction. Shields v. Barrow, 17 How., 130; Freeman v. Howe, 24 How., 460; Cross v. De Valle, 1 Wall., 14; Railroad Companies v. Chamberlain, 6 Wall., 748; Krippendorf v. Hyde, 110 U. S., 276; Phelps v. Oaks, 117 U. S., 236; Hogg v. Hoag, 107 Fed., 807, aff'd 154 Fed., 1003; Portland Wood Pipe Co. v. Slick Bros. Const. Co., 222 Fed., 528; Cleveland Engineering Co. v. Galion Dynamic Motor Truck Co., 243 Fed., 405. Jurisdiction having attached on the allegations contained in the bill the Court may, upon the hearing, dismiss the bill and grant relief under the counter-claim, although the counter-claim could not have been sustained as an original bill for lack of jurisdiction.

While the court was without jurisdiction to grant the relief which the complainant sought because the facts stated in its bill did not constitute a restraint of interstate commerce as alleged it necessarily had jurisdiction to determine the question at issue between the parties. As it acquired jurisdiction for that purpose

it acquired jurisdiction of the counterclaim as its subject matter was related to and connected with the matters in the original bill, those matters being the future quotations on the Exchange and the contract restricting their distribution. A court of "equity does justice completely and not by halves," and a cause once properly in a court of equity for any purpose will be retained to grant relief which otherwise might not be within the range of its authority—as this Court decided in Pierce v. New York Dock Company, 265 Fed., 148, 158. And see McGowan v. Parish, 237 U. S., 285, 296.

The counter-claim does not bring in any new subject matter. It relates to the same contract upon which the amended bill is based and to the quotations of the New York Cotton Exchange which the complainant seeks to obtain by having the contract [fol. 142] declared illegal. The counter-claim does not introduce new and distinct matters into the litigation. The subject matter is the same in both.

We are thus brought to a consideration of the counter-claim on the merits. The defendant charged on information and belief the fact to be that the plaintiff either itself purloined the quotations of the defendant Exchange, or that it received them from some person who is purloining them and giving them to its members. When the equity of a bill rests upon the existence of a particular fact it is necessary that that fact should be clearly alleged. And the allegations of a bill seeking an injunction must be specific. Allegations made upon information and belief are, as a rule, insufficient. In any case where the matters do not lie within the personal knowledge of the plaintiff he may allege those matters upon information and belief; but the statements of the bill as to such matters should be corroborated as far as possible by the affidavits of persons having personal knowledge. Streets's Equity Practice, Vol. 3, page 1351, Sec. 2307. United States v. Butler, 278 Fed., 678; In re United States Wireless Telegraph Co., 201 Fed., 445; Leavenworth v. Pepper, 32 Fed., 718; Brooks v. O'Hara, 8 Fed., 529.

In the instant case while the allegations of the counter-claim as to the purloining of the quotations, by the complainant, or as to its receiving them from someone who is purloining them are upon information and belief, they are sufficiently supported by the affidavits which were presented to the Court in support of the counter-claim. Moreover while the complainant in reply denied that it is itself purloining the quotations it does not deny in any pleading or affidavit that it is receiving them. The right of the New York Cotton Exchange to protect by injunction its right in the quotations which it collects is, under the circumstances disclosed, indisputable. As the Court said in the similar case of Board of Trade v. Christie Grain & Stock Co., 198 U. S., 236, 250:

[fol. 143] "* * * The plaintiff's collection of quotations is entitled to the protection of the law. It stands like a trade secret. The plaintiff has the right to keep the work which it has done or paid for doing, to itself. The fact that others might do similar work, if they might, does not authorize them to steal the plaintiff's. Compare Bleistein v. Donaldson Lithographing Co., 188 U. S.,

239, 249, 250. The plaintiff does not lose its rights by communicating the result to persons, even if many, in confidential relations to itself, under a contract not to make it public, and strangers to the trust will be restrained from getting at the knowledge by inducing a breach of trust and using knowledge obtained by such a breach."

See Exchange Telegraph Co. v. Gregory & Co. (1896), 1, Q. B. D., 147; F. W. Dodge Co. v. Construction Information Co., 183 Mass., 62; Board of Trade v. C. B. Thomson Commission Co., 103 Fed., 902; Board of Trade v. Hadden-Krull Co., 109 Fed., 705; National Tel. News Co. v. Western Union Tel. Co., 119 Fed., 294; Illinois Commission Co. v. Cleveland Tel. Co., 119 Fed., 301; Board of Trade v. McDermott Commission Co., 143 Fed., 188, 190; McDermott Commission Co. v. Board of Trade, 146 Fed., 961, 962; Board of Trade v. Hadden-Krull Co., 109 Fed., 705; Board of Trade v. Cella Commission Co., 145 Fed., 28; Board of Trade v. Price, 213 Fed., 336.

The order appealed from, which denied the complainant's motion and granted the defendant's for a preliminary injunction, is affirmed. And the Court below is directed to dismiss the complainant's amended bill.

[fols. 144 & 145] IN UNITED STATES CIRCUIT COURT OF APPEALS

Present: Hon. Henry Wade Rogers, Hon. Martin T. Manton, Hon. Julius M. Mayer, Circuit Judges.

FRANK MOORE, as President, etc., Plaintiff-Appellant,

v.

NEW YORK COTTON EXCHANGE et al., Defendants-Appellees

Appeal from the District Court of the United States for the Southern District of New York

JUDGMENT—December 21, 1923

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed with costs, and the court below is directed to dismiss the complainant's amended bill.

H. W. R.
M. T. M.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

[fol. 146] In United States Circuit Court of Appeals

[Title omitted]

Stipulation re Affidavits

It is hereby stipulated by and between the parties hereto that the affidavits of Robert J. Hall, Gardner Irving, Thomas Hale, and George J. Burmeister, printed in the transcript of the record in the above cause, shall have the force and effect of testimony in support of the counterclaims contained in the answers of the defendants-appellees offered at the trial, and that United States Circuit Court of Appeals for the Second Circuit may direct the entry of such final judgment on said counterclaims as in its opinion the court below should enter thereon and that the order and mandate be modified accordingly, without prejudice to complainant's right, if any, to appeal to the Supreme Court of the United States.

Dated, January 4, 1924.

John M. Coleman, Attorney for Complainant. Cadwalader, Wickersham & Taft, Attorneys for New York Cotton Exchange, Defendant-Appellee. Francis R. Strak, Attorney for the Western Union Telegraph Co. and the Gold & Stock Telegraph Co. Defendants-Appellees.

Consented to. H. W. R. M. T. M.

[fol. 147] In United States Circuit Court of Appeals

[Title omitted]

Order for Mandate—January 9, 1924

An order for mandate having been filed and entered herein on the 21st day of December, 1923 directing that the order of the District Court appealed from herein be affirmed with costs and the court below directed to dismiss the complainant's amended bill;

And the parties having filed a stipulation that the affidavits of Robert J. Hall, Gardner Irving, Thomas Hall and George J. Burmeister shall have the force and effect of testimony in support of the counterclaim contained in the answers of the defendants-appellees, and that this court may direct the entry of a final decree on the counterclaims;

It is ordered, adjudged and decreed that the order appealed from, which denied the complainant's motion and granted the defendants a preliminary injunction, be and hereby is affirmed with costs.

It is further ordered that the District Court enter a final decree dismissing the complainant's amended bill of complaint with costs and awarding to the defendants a final injunction to the same effect [fol. 148] as the preliminary injunction in the order appealed from.

It is further ordered that a mandate issue accordingly.

H. W. R., M. T. M., J. M. M.

[fol. 149] In United States Circuit Court of Appeals

[Title omitted]

Petition for and Order Allowing Appeal

To the Honorable Judges of the Circuit Court of Appeals, Second District:

The above named Complainant-Appellant feeling himself aggrieved by the order and decree made and entered in this cause on the Ninth day of January, A. D., 1924, affirming the order and decree of the United States District Court, in and for the Southern District of New York, made and entered in said cause, and ordering and directing the said District Court to enter a final decree dismissing the complainant's amended Bill of Complaint, and awarding to the defendant a final injunction to the same effect as the preliminary injunction in the order appealed from, and that a mandate issue accordingly, and feeling that manifest error has intervened to the great damage of petitioner, he does hereby appeal from said order and decree and every part thereof to the Supreme Court of the United States, for the reasons specified in the assignment of errors which is filed herewith, and petitioner prays that his appeal be allowed and that citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said order and decree was based, duly authenticated, may be sent [fol. 150] to the Supreme Court of the United States. That the jurisdiction of the District Court of the United States for the Southern District of New York, in which this action was begun, depended upon the fact that the defendants were guilty of a violation of the Anti Trust Laws, and laws against monopolies, as made and prescribed by the acts of Congress; that the amount involved in this action and the matter in controversy exceeds the sum of $1,000, besides costs, and this is not a case in which the jurisdiction of the Circuit Court of Appeals is made final.

Wherefore, petitioner prays for an allowance of the appeal to the end that the cause may be carried to the Supreme Court of the United States, and petitioner prays for a supersedeas of said order and decree, and such other process as is required to perfect the appeal prayed for to the end that the error therein may be corrected.

John M. Coleman, Solicitor for Appellant.

Appeal allowed, and bond to cover costs fixed in the sum of One thousand dollars ($1,000), conditioned as the law directs, to be executed by a Surety Company and approved by one of the Judges of this Court.

The petition for Supersedeas is denied.

Dated, New York, N. Y. January 24, 1924.

Henry Wade Rogers, U. S. Circuit Judge.

[fol.151] In United States Circuit Court of Appeals

[Title omitted]

Assignment of Errors

Now comes Frank Moore, President of the Odd-Lot Cotton Exchange of New York, complainant in the above numbered and entitled cause, and in connection with his petition for an appeal in this cause, assigns following errors which the Appellant avers were committed upon the hearing and decision hereof, and upon which he relies for a reversal of the decision of the United States Circuit Court of Appeals for the Second Circuit.

First. The Court erred in holding that the facts stated in the amended Bill of Complaint failed to show that the subject matter of the suit affects or involves Interstate Commerce or presented any Federal question under the Federal Anti Trust Laws or otherwise sufficient to give the Trial Court jurisdiction of the suit, and for that reason dismissing complainant's amended bill.

Second. The Court erred in holding that under the facts alleged the New York Cotton Exchange has no monopoly of cotton quotations in the United States and therefore has the right to select its customers.

Third. The Court erred in holding that the New York Cotton Exchange can control the use of its quotations as it chooses, even [fol. 152] though it is a monopoly, and pursuant to a conspiracy with and among its members can withold them from people engaged in interstate buying and selling cotton and thereby make it impossible to conduct their business.

Fourth. The Court erred in holding that the amended bill of complaint does not sufficiently allege and show that the members of the Odd-Lot Cotton Exchange are engaged in Interstate Commerce.

Fifth. The Court erred in not holding that the quotations of the prices of cotton disseminated by the defendants are a part of and directly affect interstate commerce.

Sixth. The Court erred in holding that the contract between the New York Cotton Exchange and the Western Union Telegraph Co. is a lawful agreement.

Seventh. The Court erred in holding that in the sale of its quotations to the Western Union Telegraph Company a restriction on the resale or other disposition of such quotations by the Western Union Telegraph Company to such persons only as might be approved by the New York Cotton Exchange, was legal and a reasonable restriction on Interstate Commerce.

Eighth. The Court erred in holding that under the contract between the New York Stock Exchange and the Western Union Telegraph Company, the Western Union Telegraph Company merely

became and acted as the agent of the New York Cotton Exchange for the distribution of the Exchange's cotton quotations, and therefore could lawfully contract with the Exchange to restrict a resale of such quotations, acquired under such contract, to such persons only as the Exchange would approve.

Ninth. The Court erred in holding that the Amended Bill of Complaint does not allege or show a violation of the Federal Anti Trust Laws.

[fol. 153] Tenth. The Court erred in holding that the Trial Court has jurisdiction of the counterclaim for the reason that the Amended Bill of Complaint and Counterclaim relate to the same subject matter, there being no diversity of citizenship and the Court having dismissed the amended Bill of Complaint for lack of jurisdiction of the subject matter.

Eleventh. The Court erred in holding that the amended Bill of Complaint and Counterclaim relate to the same subject matter, and in effect holding that they arise out of the same transaction and therefore need not show jurisdiction of the counterclaim independently, while as shown by the Amended Bill of Complaint, plaintiff seeks to enforce a right under the Interstate Commerce and Anti Trust Laws, while the counterclaim seeks to enjoin plaintiff from unlawfully purloining and using defendant's cotton quotations.

Twelfth. The Court erred in entering the order and decree directing the District Court to enter a final judgment and decree for a permanent injunction against complainant for the reason that when the Court determined that the facts of the amended Bill of Complaint failed to show Federal Jurisdiction, the Court thereupon lost further jurisdiction over the subject matter, and in ordering the dismissal of the Amended Bill of Complaint should have ordered a dismissal of the counterclaim.

Thirteenth. The Court erred in directing the District Court to enter a final injunction against Complainant on the Counterclaim for the reason that the New York Cotton Exchange quotations are impressed with a public use, and the members of the Odd-Lot Cotton Exchange have a right to know what they are, and to make any lawful use thereof.

Fourteenth. The Court erred in directing the District Court to render a decree of final injunction against Complainant because as shown by the pleadings and proof the complainants do not receive the quotations of cotton prices until after their dissemination [fol. 154] by defendants throughout the United States and after they are impressed with a public use.

Fifteenth. The Court erred in directing the District Court to render a judgment and decree of final injunction in favor of defendants against complainant on the Counterclaim, because the al-

legations of the counterclaim and the evidence in support thereof are wholly insufficient.

Wherefore, the appellant prays that the said order and decree of the United States Circuit Court of Appeals affirming the order of the District Court and directing the District Court to dismiss complainant's Amended Bill of Complaint, and to enter a final judgment and decree awarding defendants a final injunction against the complainant on the counterclaim, be reversed.

John M. Coleman, Attorney for Appellant.

Office & P. O. Address, 29 Broadway, Borough of Manhattan, New York City.

[fols. 155 & 156] Bond on Appeal for $1,000—Approved and filed April 5, 1924; omitted in printing

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[fol. 157] In United States Circuit Court of Appeals

[Title omitted]

Waiver of Citation and Service

The issuance and service of citation on appeal in the above entitled cause from the United States Circuit Court of Appeals, Second Circuit, to the Supreme Court of the United States, is hereby waived.

May 16, 1924.

Cadwaladar, Wickersham & Taft, Solicitors for the New York Cotton Exchange. Francis R. Stark, Solicitors for The Western Union Telegraph Co. and The Gold & Stock Telegraph Co.

[fol. 158] In United States Circuit Court of Appeals

Clerk's Certificate

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 157 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Frank Moore, as President, etc., Plaintiff-Appellant, against New York Cotton Exchange et al., Defendants-Appellees, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 11th day of June

in the year of our Lord One Thousand Nine Hundred and Twenty-four and of the Independence of the said United States the One Hundred and Forty-eighth.

Wm. Parkin, Clerk. (Seal of the United States Circuit Court of Appeals.)

Endorsed on cover: File No. 30,686. U. S. Circuit Court of Appeals, Second Circuit. Term No. 721. Frank Moore, President of the Odd-Lot Cotton Exchange of New York, appellant, vs. The New York Cotton Exchange, The Western Union Telegraph Co., and The Gold & Stock Telegraph Co. Filed November 10th, 1924. File No. 30,686.

ENIED MAR 9 - 1925

Office Supreme Court, U. S.
FILED
MAR 2 1925
WM. R. STANSBURY
Clerk

Supreme Court of the United States

October Term [redacted] 1925

No. [redacted] 200

FRANK MOORE, President of the Odd Lot Cotton Exchange of New York,

Appellant,

—against—

THE NEW YORK COTTON EXCHANGE, WESTERN UNION TELEGRAPH CO. and THE GOLD & STOCK TELEGRAPH COMPANY,

Appellees.

MOTION TO ADVANCE AND FOR STAY OF MANDATE AND INJUNCTION.

JOHN M. COLEMAN,
Attorney for Appellant.

The Alpert Press, 138 Livingston St., Brooklyn, N. Y. Tel. Main 1058-1059

Supreme Court of the United States

OCTOBER TERM, 1924.

No. .....

FRANK MOORE, President of the Odd Lot Cotton Exchange of New York,

Appellant,

—against—

THE NEW YORK COTTON EXCHANGE, WESTERN UNION TELEGRAPH CO. and THE GOLD & STOCK TELEGRAPH COMPANY,

Appellees.

The Appellees, The New York Cotton Exchange, The Western Union Telegraph Company, and The Gold & Stock Telegraph Company in the above styled and numbered cause will please take notice that upon the affidavit of John M. Coleman, verified on the 31st day of January, 1925, and the transcript of the Record on Appeal from the District Court to the Circuit Court of Appeals of the Second Circuit, and the proceedings had thereon and the proceedings for Appeal to this Court, the Appellant will apply to the Honorable Supreme Court of the United States, held at Washington, D. C., on the 2nd day of March, 1925, at twelve o'clock M. or as soon thereafter as counsel can be heard for

FIRST. An order to withhold the Mandate of the Circuit Court of Appeals on the affirmance of the decree of the Court below and to suspend the enforcement of the injunction thereon granted against this Appellant, and

SECOND. For an order to advance the hearing of said cause in accordance with Rule 32 of this Court and for such other relief as appellants may be entitled to and he will ever pray.

JOHN M. COLEMAN,
Solicitor for Appellant, Frank Moore,
President of The Odd Lot Cotton
Exchange of New York.

To:
CADWALDER, WICKERSHAM & TAFT, and
FRANK R. STARK,
Solicitors for Respondents.

SUPREME COURT

OF THE UNITED STATES.

FRANK MOORE, President of the Odd Lot Cotton Exchange of New York,

Appellant,

—against—

THE NEW YORK COTTON EXCHANGE, WESTERN UNION TELEGRAPH CO. and THE GOLD & STOCK TELEGRAPH COMPANY,

Appellees.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

JOHN M. COLEMAN, being first duly sworn says,

FIRST: That he is the solicitor for the Appellant, Frank Moore, President of the Odd Lot Cotton Exchange of New York, and has been such solicitor from the institution of the suit in the Court below to the present time and is familiar with the facts herein stated.

SECOND: That the Appellant instituted this suit in the District Court of the Southern District of New York, alleging in substance that the Appellant, as such President, and the Members of his Association, as such Association, are engaged in the business of dealing in cotton and cotton futures as brokers and dealers, and that as such it is necessary in the conduct of such business to have and

use the continuous cotton quotations as made and issued by the New York Cotton Exchange. That the Appellees, The Western Union Telegraph Company and The Gold & Stock Telegraph Company are public service corporations, organized under the laws of the State of New York, and are engaged in the business of serving Cotton Brokers and Cotton Dealers with instruments called stock tickers and in selling to such customers the cotton quotations, acquired and owned by them, upon making application therefor, and paying the consideration required for such service generally. That the Appellant did make application for such service, and tendered the usual charge therefor, but that the said appellees refused to furnish such service on two grounds. First, because the New York Cotton Exchange under its contract with the said telegraph companies, by which such quotations had been sold by the said Cotton Exchange to said telegraph companies, had reserved the right to control, the resale of said quotations, by the telegraph companies, to such persons only as may be approved by said Cotton Exchange, and that the said Cotton Exchange had refused to give its consent to the service of such quotations, by the said telegraph companies, to this Appellant; and Appellants prayed for an injunction against the said appellees to enjoin them from further refusing to supply such tickers and quotations.

THIRD: That said Cotton Exchange had refused to give its consent because this Appellant threatened to make unlawful use of said quotations by the operation of a bucket shop business, and supplying such quotations to others who were engaged in such unlawful business; and appellant further alleged that such quotations were an instrumentality of Interstate Commerce and that the dealings

in, shipments and transportation of cotton between the various States was governed and controlled by such quotations, and that the refusal to serve the same interfered with the free flow of commerce.

The appellees filed a counterclaim alleging in substance, that the appellants were engaged in the aforesaid brokerage business, and that they were obtaining such quotations surreptitiously and purloining them, and prayed that the Appellant be enjoined from further purloining such quotations.

On a hearing in the District Court, the Appellant prayed for relief which was denied, and the injunction prayed for by the appellees was granted.

From this order an appeal was prosecuted to the Circuit Court of Appeals of the Second Circuit, and on a hearing in said Circuit Court of Appeals, the Court denied jurisdiction of the appellees' cause of action and affirmed the decree of the Court below ordered a dismissal of appellant's bill of complaint, and retained jurisdiction of the counterclaim and affirmed the decree granting the appellees' prayer for an injunction, and directed a final decree to be entered in the court below in accordance with its opinion. From this decree the appellant has perfected an appeal to this Court, and applied to the said Circuit Court of Appeals for an order withholding its mandate and suspending the said injunction until the appeal could be disposed of in this court, but such application was denied and mandate directed to be issued.

The Appellant shows that the said appellees are unlawfully withholding the said service, and cotton quotations, from this Appellant, and that Appellant cannot reasonably conduct its said business without the use of such quotations and ticker service, and that its business will be completely destroyed and any decree hereafter rendered adjudging it entitled to such quotation and service would

be practically of no avail, and the enforcement of the mandate of the Court of Appeals would be practically a final decision of this Appellant's rights.

WHEREFORE the Appellant shows that it should be granted an order of this Court to withhold the mandate of said Circuit Court of Appeals and to suspend the execution of such writ of injunction upon such terms as this Court may fix, the said Appellant having executed a bond for that purpose in the court below in the sum of Five Thousand Dollars, which it prays to be continued as a sufficient security, and further, that this cause be advanced on the docket because the questions involved on both the complaint and the cross claim are and have been determined wholly on questions of jurisdiction of the Court; and petitioner will ever pray.

JOHN M. COLEMAN.

Sworn to before me this
31st day of January, 1925.

JESSIE N. MOLLER,
Notary Public,
New York County.
New York.
Certificate No. 255.

Copy received.

CADWALADER, WICKERSHAM & TAFT,
Solicitors for Appellee,
New York Cotton Exchange.

FRANCIS R. STARK,
Solicitor for Appellee,
Western Union Telegraph Co. and
Gold and Stock Telegraph Co.

UNITED STATES SUPREME COURT.

FRANK MOORE, President of the Odd Lot Cotton Exchange of N. Y.,

Appellant,

—vs.—

NEW YORK COTTON EXCHANGE, WESTERN UNION TELEGRAPH CO., GOLD & STOCK TELEGRAPH CO.,

Appellees.

APPEAL FROM U. S. CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR APPELLANT ON MOTION TO ADVANCE AND FOR ORDER TO SUSPEND JUDGMENT.

This suit was instituted by the Appellant, Frank Moore, as President of the Odd Lot Cotton Exchange of New York against the defendants in the United States District Court for the Southern District of New York, to enjoin the said defendants from refusing to furnish the said plaintiff with a ticker service and continuous cotton quotations. The defendants answered the bill, and set up a counterclaim, alleging that the plaintiff was surreptitiously purloining and using the said quotations and prayed that the plaintiff be enjoined from further using such quotations. Plaintiff made a motion for a preliminary injunction against the said

defendants, and on hearing the motion the preliminary injunction was refused, and the defendants were granted an injunction *pendente lite* against the plaintiff from further using such quotations. From these orders the plaintiff appealed to the United States Circuit Court of Appeals for the Second Circuit. On the hearing of such appeal, the said Circuit Court of Appeals dismissed the plaintiff's bill, as appellant contends, for want of jurisdiction, and affirmed the order granting the defendant's judgment. Plaintiff declined to further amend and consented that final judgment be entered upon the record, as the said Circuit Court of Appeals may deem just and proper, subject to plaintiff's exceptions thereto. The said Circuit Court of Appeals thereupon directed a decree to be entered finally dismissing plaintiff's bill, and granting the defendant a permanent injunction against the plaintiffs. From this decree the plaintiff has appealed to this Court, where such appeal is now pending.

POINT 1.

The United States Circuit Court of Appeals for the Second Circuit, having dismissed the plaintiff's bill for want of jurisdiction this Court should grant the motion to advance the hearing of the cause upon that ground.

ARGUMENT.

The Appellant, Frank Moore, as President of the Odd Lot Cotton Exchange of New York, instituted this suit in the District Court of the Southern District of New York, alleging, in substance, that the plaintiff is a citizen of the State of New York and doing business in the City of New York. That the

defendants, the Western Union Telegraph Company and the Gold & Stock Telegraph Company are corporations organized and existing under the laws of the State of New York, and that the defendant, the New York Cotton Exchange, is a corporation created by special legislative enactment of the State of New York. And we quote from the opinion of the United States Circuit Court, in this cause, the substance of the allegations of the plaintiff's complaint as to its cause of action.

> "The New York Cotton Exchange can and does influence and control all dealing, trading, and commerce in cotton in the United States and to a large extent in foreign countries and therefore has thereby monopolized the cotton commerce in the United States, and that the free competitive flow of interstate commerce in such product is hampered, restrained, and monopolized by the said defendants."

And it is also alleged that,

> "The New York Cotton Exchange is a monopoly, having complete domination and control of the cotton market for the purchase and sale for future delivery as hereinbefore alleged; that it has complete control over the receipt and dissemination of the market quotations from foreign markets and of the establishment and dissemination of the quotations in the City of New York, and of the manner and to whom same may be disseminated from the City of New York and to other exchanges in the United States."

It is further alleged, that the contract,

> "Hereinbefore alleged between the New York Cotton Exchange and the Western Union Tele-

graph Company, and the Gold & Stock Telegraph Company, is in restraint of trade and commerce among the several States, and was made and entered into pursuant to a conspiracy on the part of the New York Cotton Exchange and its members constituting such exchange, in restraint of trade and commerce in the States."

It is further alleged that the contract between the New York Cotton Exchange and the Western Union Telegraph Co., and the Gold & Stock Telegraph Company, and the refusal of the New York Cotton Exchange to allow the Odd Lot Cotton Exchange of New York to install a cotton ticker, and have the continuous cotton quotations while allowing same to its competitors as hereinbefore alleged, constitute an unfair method of competition in commerce, contrary to the acts of Congress in such cases made and provided.

The Appellant further alleges, in substance, that the objects and purposes of the Odd Lot Cotton Exchange of New York at the time of its organization were, and now are, to organize and maintain an exchange in the City of New York for the purchase, sale, and exchange of cotton and to provide for the transactions of brokers and dealers in said commodity; to generally promote the cotton trade in New York and throughout the cotton States; to increase the amount thereof and to facilitate dealings and transactions in said commodity; to diffuse information as to prices, quotations, and such other matters as may relate to the trade and business of dealing in said commodity.

That the defendant, the New York Cotton Exchange with the purpose of monopolizing commerce in cotton has entered into, and now has, a contract with the defendant, The Western Union Telegraph

Company, by which the New York Cotton Exchange gives to the Western Union Telegraph Company for itself and the Gold & Stock Telegraph Company, the ownership and exclusive right to disseminate the said continuous cotton market quotations. That by the terms of said contract, the New York Cotton Exchange reserved to itself the right and authority to choose and designate the persons, companies, corporations or exchanges to whom said Western Union Telegraph Company and the Gold & Stock Telegraph Company shall sell, disseminate and deliver the said continuous cotton quotations, and the Western Union Telegraph Company acting for itself and the Gold & Stock Telegraph Co. agrees by said contract not to give said ticker or said continuous quotations to anyone except upon the agreement and consent of the New York Cotton Exchange.

That in order to conduct its business, it was, and is, necessary to have and use what is known as a continuous ticker service, owned and operated by the said Western Union Telegraph Company and the Gold & Stock Telegraph Company, in order to be upon an equal footing with its competitors, and in order to procure the same, the plaintiff made application as is required by said two companies for said continuous ticker service and being the printed application required to be signed by the applicants, and tendered to the said defendants, the usual charges therefor, but that the said defendant telegraph companies refused to grant the plaintiff such service because the said defendant, the New York Cotton Exchange, had refused permission to the said defendant telegraph company to grant such service.

The plaintiff prayed, in substance, that all of the defendants be enjoined from further refusing

such ticker service and continuous cotton quotations to the plaintiff.

The defendant, the New York Cotton Exchange, answered the bill and denied, upon information and belief, that any of the contracts referred to by the plaintiff contemplated actual deliveries of cotton made from cotton growing States to and from the State of New York, but that all of such dealings referred to sales, purchases, and deliveries of cotton in the City of New York upon negotiable warehouse receipts.

The defendant further answered,

> "This defendant admits that in order that its members (plaintiff) may carry on said business as aforesaid, it is necessary that said Odd Lot Cotton Exchange, or its members, should have the continuous quotations of this defendant, and that the said Odd Lot Cotton Exchange did make application to the defendants, The Western Union Telegraph Company, and the Gold & Stock Telegraph Company, for such quotations, on or about the first day of July, 1922, and the said two companies have failed and refused to install a ticker for the purpose of providing the plaintiff with said quotations, and that this defendant has refused to give its consent to the installation of said ticker service to said plaintiff, and that said Gold & Stock Telegraph Company is a subsidiary of the Western Union Telegraph Company and is controlled by the latter."

It is further alleged that the members of said defendant in its exchange, transacts business in the exchange by the purchase and sale of cotton on negotiable warehouse receipts in the city of New York.

The defendant further admits that the quotations made on its exchange as the result of dealings in cotton are gathered by the defendant Western Union Telegraph Company, and transmitted over its wires to tickers in the city of New York, and to all places in the United States where cotton is dealt in.

The defendant further alleges that under a final amended contract of April 21st, 1922, with the Western Union Telegraph Company, the said defendant company, and the Postal Telegraph Company, are given the exclusive right to gather the said cotton quotations and to re-sell same on such terms as it sees fit, excepting at prices fixed to its own members, and further excepted that such service and resale of quotations should be made upon written applications to said telegraph company, and such applications to be submitted to the said defendant and approved by it. Otherwise said telegraph companies are prohibited from reselling such quotations and service.

The defendant, Western Union Telegraph Company, and the Gold & Stock Telegraph Company in substance adopt the answer and the allegations contained in the answer of the defendant, New York Cotton Exchange.

The learned Court of Appeals on this bill and answer, says:

> "But all the parties to this suit are citizens of the State of New York, so that the jurisdiction of the Court in this case does not rest upon the diversity of citizenship. If jurisdiction for suit exists, it must be because the acts complained of therein violated the Federal Anti Trust Laws."
>
> "It is plain that the bill cannot be maintained under the Federal Trade Commission

Act of 1914. So that the question which we have to determine is whether the contract which the New York Cotton Exchange has made with the Western Union Telegraph Company, respecting quotations on the exchange, is a contract in restraint of trade or commerce, or whether there is shown on the part of the defendants or any of them a monopoly or an attempt to monopolize any part of Interstate Commerce."

"It cannot be said that the contract involved was entered into for the purpose of restraining trade or of creating a monopoly. It appears to us that its purpose was that of properly regulating the transactions of the New York Cotton Exchange and preventing misuse of its quotations. It is not a contract in restraint of trade or commerce within the meaning of Section 1 of the Sherman Act, as construed by the Supreme Court. Neither is it an attempt to monopolize trade and commerce among the several States within the meaning of Section 2 of the Sherman Act."

"Contracts made on the New York Cotton Exchange of the City of New York, are made in the Board room of the Exchange in this city of New York, and they provide that the cotton is deliverable from licensed warehouses in the Port of New York. Performance of the contract is made by the delivery of negotiable warehouse receipts issued by licensed warehouses in New York. There is no obligation to make delivery at any place except in the Port of New York. Such a transaction is local in its character and does not involve interstate commerce."

"But we find nothing in *Stofford vs. Wallace*, *supra*, or in *Chicago vs. Wolson*, or in any de-

cision of the Supreme Court which supports the complainant's contention that the New York Cotton Exchange is engaged in Interstate Commerce. Neither are we cited to any act of Congress which entitles the complainants to maintain this appeal. And we conclude that the bill itself must be dismissed."

It is true that the Court discusses the contract between the telegraph companies and the Cotton Exchange to determine whether or not it operates as a regulation of, or restraint upon Interstate Commerce, and as to whether it involves a reasonable or unreasonable regulation and restraint, and in that connection, erroneously holds, that the Western Union Telegraph Company does not become the owner of the Cotton Exchange quotations, and therefore obligated to serve all persons alike as a public service corporation, but that it merely acts as the agent of the New York Cotton Exchange, and while this discussion is carried on through the opinion, it finally concludes that the bill does not involve any question within the jurisdiction of the Federal Courts, and the *Ratio Decidendi* of the opinion is that the Court was without jurisdiction for the want of diverse citizenship, and for the lack of any subject involving a Federal question, and therefore felt itself compelled to dismiss the bill. Therefore, the Appellant contends that this question of jurisdiction should be promptly determined, so that if it be held, that the Federal Court has jurisdiction, that the cause can be promptly remanded to the said Circuit Court of Appeals for decision on its merits.

POINT 2.

The Court could have no jurisdiction of the counter claim if it acquired no jurisidiction of either the parties or the subject matter, under the allegations of the original bill, although the counter claim arises out of the same subject matter. If it arises out of a matter which is the subject of an independent suit in equity, then, (a) it must be a suit in equity for which an independent suit could be brought *in a Federal Court*. (b) Jurisdiction cannot be given to the Federal Court on a counter claim if the Court has no jurisdiction of the suit on the original bill.

ARGUMENT.

Here again the question of jurisdiction arises. This suit, as we have heretofore shown, was brought by the plaintiff to obtain an injunction against the defendants, to compel them to serve the plaintiff with its ticker service and continuous quotations on cotton. The defendants by their counter claim allege,

> "This defendant is informed and believes and charges the fact to be that, notwithstanding its refusal to approve said application of said Odd Lot Cotton Exchange, for said quotations, said exchange is now, either itself purloining said quotations of this defendant, or receiving them from some person who is purloining them, and is giving the same to its members who in turn are distributing them over telegraph wires to many offices in the Southern States."

And in its prayer says,

> "This defendant asks that this answer be taken as a counter claim under the rules in such cases made and provided, * * * and that temporary injunction may immediately issue, and upon final hearing hereof be made perpetual restraining said Odd Lot Cotton Exchange. * * * from having, maintaining, or permitting any telegraph or other wire running into or through its office or exchange, over which the said quotations or any of them are passing and from aiding, abetting, or assisting directly or indirectly, any member of said Odd Lot Cotton Exchange, or any other person, firm, or corporation, in the City of New York using, selling, or distributing said quotations, or any of them."

The learned Court of Appeals, after quoting equity Rule 30 says,

> "Under this rule if defendant has an independent cause of action in equity against the plaintiff, he may counter claim it, and the counter claim so pleaded being in effect a cross suit is not affected by a decree dismissing the bill on the merits. *Buffalo Specialty Co. vs. Van Cleaf*, 217 Fed. 91. The counter claim sets up a cause of action within the jurisdiction of the District Court as a Court of Equity and within its jurisdiction as a Federal Court.

If the court has jurisdiction of the original bill it has jurisdiction of the cross bill, without reference to the citizenship of the parties, and the cross bill need not disclose grounds of Federal Jurisdiction.

To this counter claim defendant pleaded that the Court had no jurisdiction of either the parties or subject matter of the counter claim.

From the foregoing statement, the court will observe that the question of jurisdiction as to this counter claim is directly raised by the contention, first, that the court having denied jurisdiction of the matter set out in complainant's bill, either as to diversity of citizenship or a Federal question, and although the matter set out in the counter claim arose out of the same transaction, the court not having jurisdiction of the subject matter. Second. The plaintiff, however, further contends, that the purloining of the defendant's quotations in the City of New York was a local act, which did not affect Interstate Commerce and did not arise out of the same question presented by the plaintiff as to its rights to the use of these quotations in Interstate Commerce.

Third. The plaintiff further contends that if the matter of the defendant's counter claim is the subject of a separate suit in equity, then the defendant must show that it is such a subject of suit in equity between the same parties *in a Federal Court*. Therefore, it must show jurisdiction independently of the plaintiff's bill.

Fourth. The plaintiff further contends that if the court has not jurisdiction of either the parties or the subject matter of the original bill, then no jurisdiction can be given by a counter claim.

So that this question of jurisdiction should be promptly determined and for that purpose the cause advanced for hearing.

POINT 3.

The matter of the injunction prayed for by the plaintiff, is so closely involved with the matter set

up in the counter claim for an injunction on behalf of the defendants, that one should not be determined and enforced without the final disposition, at the same time, of the injunction prayed for by the other, and that the denial of plaintiff's injunction and the granting of a temporary injunction on behalf of the defendants, is in substance a final judgment regardless of the result of an appeal, as it operates to destroy the plaintiff's business, and no purpose could be served thereafter in obtaining an injunction against the defendants and establishing its right to quotations.

ARGUMENT.

From the record as quoted above, and the fact that the plaintiff has executed a good and sufficient bond to stay the injunction granted to the defendant (R. P. F.) no harm could come to the defendant by suspending the preliminary injunction granted to the defendant. If the plaintiff is entitled to an injunction that would render the injunction of the defendant *Functus Officio* and merely entitle the defendant to be paid the value of its quotation service which is secured by a good and sufficient bond. If defendants are not entitled to any such writ in this court for lack of jurisdiction, then it must be apparent the defendant's injunction must be set aside and the counterclaim dismissed, and in the meantime all the harm would be done, to the same extent as if they were entitled to recover. And if the Court has no jurisdiction in any event, then the parties should be left in a position where the entire matter could be dismissed without prejudice to either party, so they would be enabled to go to the State Court for the purpose of litigating their rights. For this reason, it is

particularly important that the injunction granted to the defendants should be stayed pending the adjudication of the questions presented in this case. Appellant has applied to the learned Circuit Court of Appeals for the suspension of the decree but his application has been denied and for that reason application is now made to this court.

Respectfully submitted,

JOHN M. COLEMAN,
Solicitor for Appellant, Frank Moore,
President of The Odd Lot Cotton
Exchange of New York.

FILED
JAN 8 1926
WM. R. STANSBURY
CLERK

Supreme Court of the United States

No. 200—October Term, 1925.

FRANK MOORE, President of the Odd Lot Cotton Exchange of New York,

Appellant,

—vs.—

THE NEW YORK COTTON EXCHANGE, THE WESTERN UNION TELEGRAPH COMPANY, and THE GOLD & STOCK TELEGRAPH COMPANY,

Appellees.

BRIEF FOR APPELLANT, FRANK MOORE, PRESIDENT OF THE ODD LOT COTTON EXCHANGE OF NEW YORK.

JOHN M. COLEMAN,
Solicitor for Appellant
Frank Moore, President
Odd Lot Cotton Exchange.

OSCAR B. BERGSTROM,
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Supreme Court of the United States

FRANK MOORE, President of the Odd Lot Cotton Exchange of New York, Appellant, —vs.— THE NEW YORK COTTON EXCHANGE, THE WESTERN UNION TELEGRAPH COMPANY, and THE GOLD & STOCK TELEGRAPH COMPANY, Appellees.	No. 200 October Term 1925

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR APPELLANT, FRANK MOORE, PRESIDENT OF THE ODD LOT COTTON EXCHANGE OF NEW YORK.

The appellant filed his bill in the District Court of the Southern District of New York, against the appellees, The New York Cotton Exchange, The Western Union Telegraph Company, and the Gold & Stock Telegraph Company, seeking to enjoin the appellees from refusing to serve the appellant with the continuous cotton quotations of the New York Cotton Exchange. The appellees answered generally, and also interposed a counterclaim seeking to obtain an injunction against the appellant from purloining or unlawfully using the cotton quotations. Appellant and appellees both made motions for injunctions *pendente lite* on a hearing in the District Court. Appellant's motion was denied,

and the appellees' motion was granted on opinion by Judge Hand, 291 Fed. 681, from these orders an appeal was prosecuted to the Circuit Court of Appeals for the Second Circuit, where the orders were affirmed and appellant's bill directed to be dismissed, on opinion of Judge Rogers, 296 Fed. 61. From this decree this appeal is prosecuted to this court.

JURISDICTION.

The judgment of the Circuit Court of Appeals was rendered January 9th, 1924 (R. 70). The appellant by his bill contended

FIRST. That the New York Cotton Exchange, a membership corporation, organized under the laws of the State of New York, was engaged, through its members on the floor of the Exchange, in the purchase and sale of spot as well as future cotton. That the prices of sales were gathered continuously and delivered to the Western Union Telegraph Company for resale through its telegraph wire and ticker service. That the quotations so made by the exchange were transmitted and used by dealers in cotton in the various States of the United States and foreign countries and formed the basis of prices paid and contracts made for the transportation of cotton in commerce in the United States, and that the dealers in cotton could not transact business in interstate commerce without the use of such continuous quotations. That in the dealings in cotton on the New York Cotton Exchange, the said New York Cotton Exchange, under contract with the Western Union Telegraph Company, obtained exclusive information of the production, consumption of cotton in the United States and foreign countries, weather conditions, transporta-

tion of cotton, etc., and that by virtue of such information and the dealing in cotton on the floor of its exchange, it had acquired a monopoly of such information and a monopoly of dealing in cotton and interstate transportation thereof through its members and such persons to whom the said New York Cotton Exchange furnished or supplied such quotations, and that the said New York Cotton Exchange had refused to supply or furnish such quotations to the appellant who was also a dealer in cotton, both in New York, and in the Southern States, where cotton was generally raised, and thereby discriminated against the appellant and deprived him of his livelihood and to do business in buying, selling and shipping cotton in interstate commerce. And that such action and creation of a monopoly by the said New York Cotton Exchange violated the Sherman and Clayton Anti-Trust laws.

SECOND: That the said New York Cotton Exchange sold and delivered such continuous cotton quotations to the Western Union Telegraph Company, exclusively, for a consideration paid to it by the said Western Union Telegraph Company, and the said Western Union Telegraph Company was engaged in the business of selling such quotations by its ticker service in the City of New York, and by its interstate wires to various persons and exchanges in the various States of the United States; and particularly in the Southern States, to competitors of the appellant. And that the New York Cotton Exchange had no interest of any kind in such resales as made by the Western Union Telegraph Company. In the contract of sale of such quotations to the said Western Union Telegraph Company, the New York Cotton Exchange reserved to itself the right to designate the persons, individuals, or corporations to whom the said Western Union Telegraph Company should be permitted to

The sole ground of Federal Jurisdiction as alleged in the Bill of Complaint, is that the defendants are guilty of a violation of the Sherman Anti-Trust Act, Sec. 1 and 2, 26 Stat. 209, and is authorized by Clayton Act, 38 Stat., Part 1, Chap. 323, page 737. That the judgment and decree of the Circuit Court of Appeals is not final. Judicial Code Sec. 128 as amended by Act of Jan. 28, 1915, Chap. 220, 38 Stat. 803.

The amount in controversy herein besides costs exceeds One Thousand Dollars. Vide, Paragraph "Seventh" of Bill of Complaint (R. 2). Paragraph twenty-first of answer (R. 23) Petition for Appeal (R. 71) The Judicial Code Sec. 241.

re-sell such quotations. That such contract created a monopoly and was violative of the Anti-Trust laws as provided by the Sherman Anti-Trust Act and the Clayton Act. And that the appellant had applied to the Western Union Telegraph Company for the service of such quotations in the State of New York, and for use in the Southern Cotton States upon the usual terms and conditions upon which the Western Union Telegraph Company was selling and serving such quotations to his competitors, but that the said Western Union Telegraph Company, at the instance of the said New York Cotton Exchange, refused to sell or serve said quotations to the appellant.

The appellees contended FIRST, that the quotations so made on the floor of the New York Cotton Exchange were the result of local transactions arising from the purchase and sale of spot and future cotton for delivery in New York, and therefore they were local transactions and the quotations did not so directly affect interstate commerce as to come within the provisions of the Federal Anti-Trust Laws.

SECOND. That the quotations so made on the floor of the New York Cotton Exchange were the specific property of the exchange, and that the exchange had the right to monopolize the same and either sell or not to sell such quotations as it saw fit, and in making sales thereof it had the right to select its own customers and sell the same subject to any conditions and restrictions as to the use of such quotations as the said exchange saw fit.

THIRD. That in the sale of such quotations to the Western Union Telegraph Company, a public service corporation, for resale and transmission over its wires, the New York Cotton Exchange had

the right to make any reservations as to the resale and transmission of such quotations as it saw fit without violating the Sherman Anti-Trust Laws.

Sherman Anti-Trust Act, Sections 1 and 2, 26 Stat. 209;
Clayton Act, 38 Stat., Part 1, Chap. 323, p. 737;
Straus vs. Victor Machine Co., 243 U. S. 490;
Straus vs. Publishers' Association, 231 U. S. 222;
U. S. vs. Patton, 226 U. S. 525;
Swift vs. U. S., 196 U. S. 375;
Stafford vs. Wallace, 258 U. S. 495;
Board of Trade vs. Olson, 262 U. S. 1;
General Investment Co. vs. Lake Shore & Michigan Southern Ry., 260 U. S. 261;
Chas. A. Ramsay & Co. vs. Associated Bill Posters, 260 U. S. 501.

The appellees in their counterclaim contended that the appellant was purloining the continuous cotton quotations of the New York Cotton Exchange or was obtaining and using them without the authority or permission of the appellees, and prayed for an injunction against the appellant from so doing.

The appellant contended, First, that the Court had no jurisdiction of the counterclaim because both the appellees and appellant were citizens of the State of New York, and that the act of purloining such quotations did not involve a Federal question.

Supreme Court Equity Rule 30;
Standard Paint Co. vs. Trinidad Asphalt Co., 220 U. S. 446;

Ayers vs. Wiswall, 112 U. S. 190;
Cleveland Engineering Co. vs. Gallion Truck Co., 243 Fed. 407;
Geneva Furniture Co. vs. Karpen, 238 U. S. 254.

The Circuit Court of Appeals held: (a) That the New York Cotton Exchange, as the owner of the property right in the quotations, had the right to refuse to sell the quotations, and had the further right to select its customers in case of sale of the quotations.

(b) That the quotations arise out of local transactions on the floor of the exchange and therefore did not become instrumentalities of interstate commerce and the court was without jurisdiction and dismissed the bill.

(c) That the counterclaim arises out of the same subject-matter as set out in the bill, and therefore the court had jurisdiction of the counterclaim.

(d) That the sale of the quotations to the Western Union Telegraph Company by the New York Cotton Exchange limiting the right of the Telegraph Company to re-sell such quotations to such persons only as were approved by the Cotton Exchange, merely constituted the Telegraph Company the agent of the Cotton Exchange for the sale and transmission of the quotations.

STATEMENT OF CASE.

Plaintiff's bill was directed to be dismissed on the motion for a preliminary injunction, and a preliminary injunction was granted on the counterclaim. We make this statement of the case from the amended bill and the counterclaim, excluding

the answers which are not here under consideration. The material portions of the amended bill are as follows:

> Fourth. That the Western Union Telegraph Company is a public service corporation engaged in Interstate Commerce by transmitting messages for the public by means of telegraph and cable wires among and between the various States of the United States, and among and between the States and Territories of the United States, and among and between the States and Territories of the United States and foreign countries, and the District of Columbia. That said Western Union Telegraph Company is chartered and organized by and under the laws of the State of New York, with its principal office in the City, County and State of New York, and within the Southern District of New York (R., 1).
>
> Fifth. That the Gold and Stock Telegraph Company is a corporation chartered and organized by and under the laws of the State of New York, with its principal office likewise in the City, County and [fol. 4] State of New York, and within the Southern District of New York. That at all the times hereinafter alleged said company was and is engaged in the business of publishing, circulating and disseminating market news and the continuous and instant quotations of cotton prices by means of ticker service located in exchanges, brokerage houses, with cotton dealers, and elsewhere throughout the United States and Territories, and the District of Columbia, and is and was at the times hereinafter alleged engaged in Interstate Commerce by the dissemi-

nation for hire of said news and cotton price quotations between the various States of the United States and among and between the various States and Territories of the United States, and among and between the various States and Territories, and The District of Columbia.

Eighth. The objects and purposes of the Odd Lot Cotton Exchange of New York at the time of its organization were and now are: "To organize and maintain an exchange in the City of New York for the purchase, sale and exchange of Cotton and to provide for the transactions of brokers and dealers in said commodity; to generally promote the Cotton Trade in New York and throughout the Cotton [fol. 5] States; to increase the amount thereof, and to facilitate dealings and transactions in said commodity; to diffuse information as to prices, quotations, and such other matters as may relate to the trade and business of dealing in said commodity."

Ninth. That the members associated together and constituting said Odd Lot Cotton Exchange of New York, some One Hundred in number, maintain an Exchange in the City of New York wherein they buy and sell cotton for future delivery without limit as to quantity, except that no lot bought or sold shall be less than (10) bales.

Tenth. That the members of the defendant, New York Cotton Exchange, are in the same business as the members of the Odd Lot Cotton Exchange of New York, and are likewise unlimited as to the quantity of cotton dealt in, except that no lot shall be less than one hundred (100) bales.

Eleventh. That the contracts made by and between members of the Odd Lot Cotton Exchange of New York have been and are chiefly for customers consisting of producers of cotton, merchants, brokers, factors, commission men, and others, located, resident and in business in other States than the State of New York, and chiefly in the great cotton producing States of the South, to-wit: North Carolina, South Carolina, Georgia, Alabama, Mississippi, Louisiana, Texas, Arkansas and Oklahoma (R., 2).

Twelfth. That said contracts of purchase and sale made and executed by said parties resident in said last enumerated States, by and through the members of the Odd Lot Cotton Exchange of New York, [fol. 6] have been and are now made upon orders transmitted by the defendant, The Western Union Telegraph Company, by wire, and all reports concerning and confirmations of such purchases and sales by said members are likewise transmitted by the Western Union Telegraph Company.

Thirteenth. That said purchase and sale messages are among and between the different States enumerated in the Eleventh paragraph hereof, and among and between each and all said States and the State of New York, and are by and between purchasers and sellers of cotton, resident and engaged in business in said enumerated cotton producing States, and the State of New York.

Fourteenth. That the said contracts of purchases and sale of cotton of, by, for and between said residents of said cotton producing States, and other States, including the State

of New York, are of and concerning and are in reference to and include actual deliveries made and to be made from said cotton growing States, to and into the State of New York, said deliveries being made by and for the sellers and to the purchasers of cotton produced and grown, and to be produced and grown in said cotton producing States.

Fifteenth. That said purchases and sales constitute a large and important part of the Interstate Commerce as between said cotton growing States and other States, including the State of New York. That in addition to the said interstate sales and purchase as alleged for delivery from said States, through and into many States of the United States, and into the State of New York, the said Interstate [fol. 7] Commerce involves the Interstate shipments and transportation of said commodity, through and from said cotton growing States, to the State of New York, whence it is consigned and shipped to other cotton markets of the United States and foreign countries for manufacture.

Seventeenth. That fair and equal opportunity of the public, including farmers and growers of cotton, merchants, cotton factors, commission men, dealers in cotton, and others, requires that there be a ready market wherein quantities of less than One Hundred (100) bales may be bought or sold, and that without such a market, small growers of cotton and merchants, factors, commission men and all others possessing cotton in lots of less than One Hundred (100) bales, or who will by some future month grow or have on hand for delivery such amounts, are denied a market

and are excluded from equal opportunity to buy or sell at reigning prices from time to time for future delivery, and are thereby unfairly discriminated against and denied the equal right to take advantage of the future market prices from time to time to protect themselves against sudden rise or decline in prices, or to hedge or protect themselves on future sale and delivery of spot cotton bought and delivered, or upon which they may advance money (R., 3).

Twentieth. That the Odd Lot Cotton Exchange, and its members, opened an Exchange in the City of New York for the use of its members, on or about the first day of August, 1922, and have [fol. 9] operated it ever since said date. That upon said exchange the members thereof have conducted the business of buying and selling cotton for future delivery for customers resident in and in business, as set forth in Paragraph Eleventh hereof, and the said transactions constitute Interstate Commerce, as set forth in Paragraphs Eleventh to Fifteenth, inclusive, hereof. That most of said purchases and sales have been between and among people resident and in business in the cotton growing States hereinbefore enumerated, and among and between them and persons resident and in business in other States, including the State of New York, and said transactions have been and now are concerning and embrace the buying, selling, shipping and transportation of cotton among said cotton States, and from, into and through said States and into other States, including the State of New York, and that said Interstate purchases in most instances embraced and

covered cotton to be re-shipped and re-transported from the State of New York to other States and foreign countries for manufacture (R., 4).

Twenty-first. That in order to promptly and efficiently serve the said members of the Odd Lot Cotton Exchange, and brokers dealing on said exchange, and the customers of said members and of said brokers, it is necessary and has been necessary since the beginning of operations by complainant, that it have what is known as a continuous ticker service owned and operated by defendants, The Western Union Telegraph Company and the Gold & Stock Telegraph Company, and in order to procure same, complainant made application [fol. 10], as is required by the said two companies for said continuous ticker service, said application being of date on or about the first of July, 1922, *and being the printed application required by defendants to be signed by all applicants for their continuous quotations as set forth in the contract between the New York Cotton Exchange and the Western Union Telegraph Company and your orator was then ready, able, willing and offered to pay whatever charges might be made and exacted therefor and to comply with all requirements of defendants, and is now ready, able and willing and offers to pay said charges, and to comply with all requirements of defendants.* That at the time of making said application for said service to the Manager of the Western Union Telegraph Company, and

*Matter appearing between stars is an amendment to the amended bill of complaint allowed by the Court with consent of defendants' solicitors at the argument of motions for injunctions.

who is in charge of such applications, complainant's representative presenting said application was informed and advised that said application could not be granted, except upon the express consent of the New York Cotton Exchange. That since the making of said application, the said Western Union Telegraph Company and the Gold & Stock Telegraph Company have failed and refused to install a ticker for the use of complainant giving continuous cotton quotations, as called for in said application, and the New York Cotton Exchange has failed and refused to give its consent to the installation of said ticker service for continuous cotton quotations.

Twenty-second. That the defendant Gold & Stock Telegraph Company [fol. 11] is a subsidiary of the defendant Western Union Telegraph Company, completely dominated and controlled by said Western Union Telegraph Company. That the officers and directors of each of said companies, as your orator is informed, are the same and identical.

Twenty-third. That the defendant, the New York Cotton Exchange, with the purpose of monopolizing commerce in cotton, has entered into and now has a contract with the defendant, The Western Union Telegraph Company, by which the New York Cotton Exchange gives to the Western Union Telegraph Company for itself and the Gold & Stock Telegraph Company, the ownership and exclusive right to disseminate the said continuous cotton market quotations. That by the terms of said contract, the New York Cotton Exchange reserves unto itself, the right and authority to choose and designate the persons, companies, corpora-

tions or exchanges to whom the said Western Union Telegraph Company, and the Gold & Stock Telegraph Company shall sell, disseminate and deliver the said continuous cotton quotations, and the Western Union Telegraph Company acting for itself, and the Gold & Stock Telegraph Company agrees by said contract not to give said ticker or said continuous quotations to anyone, except upon the agreement and consent of the New York Cotton Exchange (R., 5).

Twenty-fourth. That the Odd Lot Cotton Exchange of New York is not required by either of the defendants to comply with any terms or conditions entitling them to said ticker and said continuous cotton quotations, but the said service has been captiously, unreasonably [fol. 12] and with extreme discrimination, refused to the said Odd Lot Cotton Exchange, and the members thereof, on equal terms with their competitors in said business and commerce. That the said refusal to furnish said service by the Western Union Telegraph Company, and the Gold & Stock Telegraph Company, is wholly on account of said contract with the New York Cotton Exchange, which forbids their so doing without its consent.

Twenty-fifth. That the defendant New York Cotton Exchange has a monopoly upon the receipt and dissemination of the cotton price quotations on the foreign markets of the world, and in the establishment and dissemination of cotton price quotations in the City of New York, and by these the quotations and prices of cotton, both spot and for future delivery, are influenced, guided and fixed in all

the exchanges and markets of all the States of the United States. Your orator further alleges that cotton as a commodity is of great value, aggregating in the United States alone from Seven hundred Million Dollars to approximately a Billion Dollars in the raw state and in the course of Interstate Commerce and manufacture, and trade, rise in value to many times that sum. That such commodity is sold, traded in and transported into and through the various States of the United States of America and to foreign countries. That large quantities of cotton are also grown in Egypt, India and other parts of the world and come in competition with the cotton grown in the United States particularly in the markets of the British Empire, the European Continent and the Oriental countries. That the trade, [fol. 13], commerce, and manufacture of cotton into articles of commerce has become so extensive that a fraction of a cent difference in the market value or price of such cotton represents large amounts of profit or loss, so that the commercial custom has reduced trading to prices fixed continuously during the business hours of the day; and that all trading and dealings in cotton both spot, that is to say, for immediate delivery, and future, or cotton to be delivered at some future date, are governed by quotations as hereinafter set out, made continuously during the trading day. That such custom of buying, selling, and trading in cotton upon continuous quotations has grown and developed by many years of custom and practice, so that such trading upon quotation controls the price of the raw product in the hands of the grower as well as in the hands of the spinner or manufacturer. That

the value of the cotton produced the world over is constantly controlled by the probable supply and the probable demand or consumption and this supply and demand is constantly changing. The supply area planted, changing weather conditions increasing or retarding its growth, and destruction by insects. So that the dealing, trading in, and transportation of cotton in the United States and foreign countries is controlled by the instrumentalities for gathering all information as to supply and demand and prices resulting therefrom on the markets where such trading and dealing is carried on. That the dealer in spot cotton relies on the current quotation as a basis of value for buying and selling for such immediate delivery and the spinner, manufacturer or consumer relies upon such quotation for his immediate deliveries [fol. 14] as well as future deliveries. That the spinners and manufacturers have become accustomed to and are required by reason of competitive conditions to make contracts for the purchase and delivery of their cotton for the probable amount required during the year's cotton season. That in making such contracts, they are compelled to rely upon the current quotations and while carrying such contracts, the price of such future delivery cotton may on any day greatly change by reason of the conditions before set out, which could not have been anticipated. That by reason of such changes, the purchaser of such cotton for future delivery must be kept informed of the quotations and the probable supply and demand as aforesaid, so that he may have a free market in which to make sale

of cotton bought at excessive prices to avoid heavy damage and probably bankruptcy because of his inability to freely sell and buy as conditions may change.

That the defendant, The New York Cotton Exchange, has been for many years engaged in the business of gathering the information as to the actual and probable supply and demand for cotton the world over. That the information as to the Egyptian and Indian cotton production as well as the probable British Continental European, and Oriental demand is generally concentrated by like system, in Liverpool, England, and the prices fixed in the cotton trade in the United States is in a large measure influenced by the continuous quotations of the Liverpool Exchange. And that the defendant, The New York Cotton Exchange, has the exclusive control by an arrangement with the Liverpool exchanges of such continuous quotations and that by reason of such long continued practice, and contracts with foreign exchanges, the said defendant, The New York [fol. 15] Cotton Exchange, has acquired a complete monopoly of such information and by reason thereof controls the price quotations, which is the chief instrumentality in the control and handling of trade, commerce in cotton between all the States of the United States and largely in foreign countries. That by reason of the control of such information it is enabled to continuously supply its own members with such information to the exclusion of all other dealers, traders in, or owners, or purchasers of cotton. That by reason of which information, and the exclusive advance information as to the prices on the Liverpool Exchange, the members of said New

York Cotton Exchange are enabled to deal in, buy and sell spot as well as future cotton and the prices at which such dealings are made continuously during the day become the official quotations of said New York Cotton Exchange and such quotations by reason of its combination with its members become the property of the said defendant, The New York Cotton Exchange. That the said defendant, The New York Cotton Exchange, thereby obtains exclusive control of such quotations and is engaged in the business of selling such quotations.

That the trading in cotton has become by fixed custom and practice carried on continuously during the day on quotations disseminated as aforesaid, and therefore the telegraph lines have become a necessary and substantially an exclusive instrumentality for communicating to all of the States, such quotations and information as are given out by the said New York Cotton Exchange. That by reason of the control and ownership of such quotations by the said defendant, The New York Cotton Exchange, can and does prohibit the defendant, The Western Union Telegraph Company and the Gold & [fol. 16] Stock Telegraph Company, from communicating or delivering its said information and quotations to any person or corporation except such as may be designated by their said co-defendant, the New York Cotton Exchange.

That by reason of the control of the said instrumentalities of commerce, the said defendant, the New York Cotton Exchange, can and does influence and control all dealing, trading and commerce in cotton in the United States and to a large extent in foreign

countries, and therefore has thereby monopolized the cotton commerce in the United States, and that the free competitive flow of Interstate Commerce in such product is hampered, restrained and monopolized by the said defendants (R., 6 & 7).

Twenty-sixth. That in the conducting of said Exchange and in the said transactions for the purchase and sale of cotton, the Odd Lot Cotton Exchange of New York and its members are in direct and close competition with the defendant New York Cotton Exchange, its members and brokers operating thereon, and in close competition with the Cotton Exchange of the cities of New Orleans, La., Memphis, Tenn., Houston, Texas, Atlanta, Augusta and Savannah, Ga. That complainant is informed that the New York Cotton Exchange has consented that the last named exchanges receive the continuous cotton quotations, and that pursuant thereto, the Western Union Telegraph Company and the Gold & Stock Telegraph Company furnishes to the said last named exchanges the said continuous cotton quotations, thereby openly and purposely discriminating against the Odd Lot Cotton Exchange of New York, and by said acts using and employing unfair [fol. 17] and unlawful methods of competition in commerce in direct violation of the Acts of Congress.

Twenty-seventh. For further grounds of complaint, the complainant says that it is necessary to the business of the complainant and of its members, brokers executing orders on its Exchange, that from time to time, they execute orders with other brokers, including members of the New York Cotton Exchange.

That in order to more completely monopolize the said business, and as constituting additional acts of discrimination and unfair methods of competition, complainant alleges that the said New York Cotton Exchange objects to and prohibits its members transacting business with the members of the Odd Lot Cotton Exchange, and among other instances, and evidence thereof, complainant says, on January 3, 1923, certain members of the New York Cotton Exchange who were engaged in the transaction of business with members of the Odd Lot Cotton Exchange involving the purchase and sale of cotton for future delivery were, by the official Supervisory Committee of the New York Cotton Exchange, advised and directed to discontinue their business transactions with members of the Odd Lot Cotton Exchange (R., 8).

Twenty-eighth. As a further instance of the said unlawful purposes on the part of the New York Cotton Exchange, it prohibits its members from imparting to the Odd Lot Cotton Exchange, or any of its members, the prices or quotations prevailing upon the New York Cotton Exchange, and that the penalty for the violation of said rule is expulsion.

[fol. 18] Twenty-ninth. That all of the aforesaid unlawful acts and conduct on the part of the New York Cotton Exchange against the Odd Lot Cotton Exchange of New York, were and are wholly unlawful, and your orator alleges the fact to be that the New York Cotton Exchange is a monopoly, having complete domination and control of the cotton market for the purchase and sale for future delivery, as hereinbefore alleged; that it has

complete control over the receipt and dissemination of the market quotations from foreign markets, and of the establishment and dissemination of the quotations in the City of New York, and of the manner, and to whom, same may be disseminated from the City of New York and to other exchanges in the United States.

Thirtieth. That the said contract herein before alleged between the New York Cotton Exchange and the Western Union Telegraph Company and the Gold & Stock Telegraph Company is in restraint of trade and commerce among the several States and was made and entered into pursuant to a conspiracy on the part of the New York Cotton Exchange and its members, constituting said exchange, in restraint of trade and commerce among the States.

Thirty-first. That the said contract between the New York Cotton Exchange and the said two telegraph companies, defendants, and the captious and unreasonable refusal to allow the Odd Lot Cotton Exchange of New York to have installed, for the use of its members, a cotton ticker, together with the continuous cotton quotations, is an attempt on the part of said defendants, and particularly of the New York Cotton Exchange, and its members, to monopolize the trading [fol. 19] in cotton for future delivery in the City of New York, and to monopolize cotton quotations and the dissemination thereof (R., 9).

Thirty-second. That the said contract between the New York Cotton Exchange and the Western Union Telegraph Company and the

Gold & Stock Telegraph Company, and the refusal of the New York Cotton Exchange to allow the Odd Lot Cotton Exchange of New York to install a cotton ticker, and have the continuous cotton quotations, while allowing same to its competitors as hereinbefore alleged, constitute an unfair method of competition in commerce contrary to the acts of Congress in such cases made and provided.

Thirty-third. That the said unlawful acts on the part of the defendants, and particularly on the part of the New York Cotton Exchange, as set forth in the foregoing paragraphs Twenty-third to Twenty-ninth, inclusive, and the failure and refusal of the New York Cotton Exchange and its members to allow members of said exchange to trade and deal with members of the Odd Lot Cotton Exchange of New York, concerning the purchase and sale of cotton for future delivery, and the prohibition of its members imparting cotton quotations to members of the Odd Lot Cotton Exchange of New York, are such and all for the express purpose and with the design of excluding from the business of purchasing and selling cotton for future delivery on any exchange in the City of New York, except the New York Cotton Exchange; and the said unlawful acts have the effect of restraining Interstate trade and commerce by the arbitrary use of the power possessed by the New York Cotton Exchange [fol. 20], by reason of its monopoly, to crush and eliminate weaker competitors, including the Odd Lot Cotton Exchange of New York. That the said unlawful acts have the effect of restraining the freedom of action in Interstate trade and commerce, and unduly

suppress and restrain the play of competition in the conduct thereof.

Thirty-sixth. That if the defendants be permitted to continue the said unlawful acts hereinbefore complained of, they will result in the complete destruction of the business of the Odd Lot Cotton Exchange of New York, and of each and all of the members thereof (R., 10).

In consideration whereof, and inasmuch as your orator has no sufficient remedy at law for the wrong done and threatened to be done, and inasmuch as the remedy at law will afford no protection to your orator, and those for whom he sues, against the wrong done and threatened to be done, as aforesaid, and inasmuch as the wrong done and threatened to be done to your orator, and those for whom he sues, is relievable only in a court of equity where matters of this kind are properly cognizable and reviewable, your orator, to the end that he may obtain the relief to which he is justly entitled in the premises, prays:

[fol. 22] (3) That the defendants, and each of them, and their officers, agents, attorneys and legal representatives, be perpetually restrained from carrying out the terms of said contract; that they be further restrained from refusing to install in the exchange of the Odd Lot Cotton Exchange of New York a ticker for the purpose of receiving continuous cotton quotations, and from further refusing to give and disseminate to the Odd Lot Cotton Exchange of New York, and its members, the continuous cotton quotations, the same as is furnished to and disseminated by the New

York Cotton Exchange, through the said two telegraph companies, defendants, to other exchanges, individuals, corporations and brokers (R., 11).

The material portions of the counterclaim are as follows:

Twenty-first. This defendant is informed and believes and charges the fact to be that, notwithstanding its refusal to approve said application of said Odd Lot Cotton Exchange for said quotations, said exchange is now, either itself purloining said quotations of this defendant, or receiving them from some person who is purloining them, and is giving the same to its members, who in turn are distributing them over telegraph wires to many offices in the Southern States, wherein bucket shops are conducted, and wherein said quotations are displayed on blackboards for the purpose of promoting the conduct of said bucket shops, and that the unauthorized receipt and use of said quotations by said plaintiff and its members, as aforesaid, is calculated to and in time will, if not entirely stopped, seriously impair [fol. 45] the value of this defendant's said quotations, and thus ultimately entirely defeat the efforts of this defendant to prevent the use of such quotations in bucket shops as a basis of illegal bets, and will also materially impair the right of this defendant to derive a revenue from the distribution of said quotations, and this defendant is advised by its counsel that the only adequate jurisdiction for the protection of its property in said quotations is that of a court of equity, and the only adequate remedy is a writ of injunction issu-

ing therefrom, permanently enjoining said Odd Lot Cotton Exchange from receiving, using or distributing said quotations, and that the amount involved in the matter set up in this counterclaim, and matter in dispute involved herein, exclusive of interest and costs, is much more than the sum of $3,000 (R., 22).

Wherefore, this defendant prays that the bill of complaint herein be dismissed as to said defendant with its costs and this defendant asks that this answer be taken as a counterclaim under the Rules in such case made and provided, and that said Odd Lot Cotton Exchange be required to make true, direct and complete answer to this defendant's said counterclaim, but not under oath (an answer on oath being hereby waived), and that a temporary injunction may immediately issue and upon final hearing hereof be made perpetual, restraining said Odd Lot Cotton Exchange and each and every of its officers, agents, employees and servants from receiving, using, selling or distributing, directly or indirectly, the quotations of this defendant, or any of them, and from having, maintaining or permitting any telegraph or other wire running into or through its office or exchange, over which said quotations or any of them are passing, and from aiding, abetting or assisting, directly or indirectly, any member of said [fol. 46] Odd Lot Cotton Exchange, or any other person, firm or corporation, in the City of New York using, selling or distributing said quotations or any of them, until it, he or they shall have first lawfully acquired the right to receive said quotations, either by contract or purchase from this defendant, or with this defendant's consent and approval, from one of the telegraph

companies authorized by this defendant to distribute such quotations and that this defendant may have such other and further relief in the premises as will fully protect this defendant's property right in said quotations and which to this Honorable Court may seem meet (R. 23).

The material portions of the contract between the Western Union Telegraph Company and the New York Cotton Exchange are as follows:

That whereas the Telegraph Company desires the privilege of receiving for distribution to its customers complete quotations of prices at which transactions in cotton are made during business hours upon the trading floor of the exchange; and

Whereas, the Telegraph Company desires to collect all quotations, reports and statistics posted, announced or read off on the trading floor of the Exchange; and

Whereas, the Exchange desires the Telegraph Company to furnish and deliver to it such quotations and reports of domestic cotton markets, reports on the movement of cotton and reports of the weather and Government reports on condition, acreage, yield, ginning of cotton and such other reports as the Exchange may require; and

Whereas, the Exchange and the Telegraph Company are willing to grant each to the other the foregoing privileges upon the terms hereinafter set forth;

Now, therefore, in consideration of the premises and of the covenants and agreements

herein contained the parties hereto have mutually agreed as follows:

First: The Exchange agrees at its own cost and expense to furnish to the Telegraph Company under the limitations, conditions and restrictions hereinafter prescribed, full and continuous quotations of the prices at which transactions in cotton are made upon the floor of the Exchange during the hours for trading prescribed by its rules. Said continuous quotations wherever referred to in this agreement shall be construed to mean every service of quotations wherein the (fol. 49) price of cotton shall be quoted oftener than at intervals of fifteen (15) minutes and shall embrace substantially such as have been supplied by the Exchange to the Telegraph Company under the contract heretofore existing between them. The Exchange does not guarantee the accuracy or completeness of said quotations but undertakes to use reasonable diligence to make the same as full, complete and accurate as may be practicable; it being distinctly understood and agreed however that the Exchange shall not be liable to the Telegraph Company for any inaccuracies, errors, or omissions in said quotations or for any damages arising therefrom or occasioned thereby.

The Telegraph Company may furnish said quotations in whole or in part to its customers by means of tickers or by telegraph or telephone wires and instrument or by messengers, subject to the limitations, conditions and restrictions of this agreement. The Telegraph Company in relaying said quotations to its offices and customers shall use its utmost endeavors to prevent the tapping of any wire

or wires over which the same are transmitted and to prevent [fol. 51] any persons other than those to whom it furnishes the same, after full compliance with the limitations, conditions and restrictions hereof, from obtaining the same from it or from any of its employees (R., 25).

Second. The Telegraph Company shall have the right to serve said quotations to members of the Exchange or to any firm of which a member of the Exchange is a partner, at their offices or branch offices, and shall charge such members of the Exchange, or their firms, for the use of tickers delivering such quotations in their offices in New York City, not exceeding Twenty-five dollars ($25.00) per month for each ticker installed south of Chambers Street, and Thirty dollars ($30.00) per month for each ticker installed in Chambers Street or in streets between Chambers and 60th Street and Thirty-five dollars ($35.00) per month for each ticker installed in 60th Street and in streets between 60th and 125th Streets including the latter.

The Telegraph Company shall have the right to serve said continuous quotations to all persons, firms, corporations and organizations in New York City or elsewhere, wherever the Telegraph Company may desire to serve them, including any other Telegraph Company owned, leased or controlled by it or with which it now has or may hereafter have any operating contract or other arrangement for exchange of business, but not to persons, firms or corporations who or which may be directly or indirectly engaged in the promotion or maintenance of bucket shops or other places

where such continuous quotations are used as a basis for bets or other illegal contracts [fol. 53] based upon fluctuations of the prices of cotton or of any stocks, bonds or other securities or commodities wherein both parties, or the party maintaining such office or place or conducting such busines,s or said subscriber, contemplate or intend that such contracts, agreements, trades, or transactions shall, or may be, closed, adjusted or settled according, or with reference, to the quotations of any Exchange, Board of Trade, or market place, upon which cotton, stocks, bonds or securities or commodities are dealt in, together with the right to collect its tolls and charges therefor, which tolls and charges shall belong to and be retained by the Telegraph Company.

Nothing herein contained shall be construed as imposing upon the Telegraph Company the duty to investigate and determine the character of the business conducted by any person, firm or corporation applying for or receiving said continuous quotations but the Telegraph Company shall not under any circumstances directly or indirectly furnish said continuous quotations to any person, firm, corporation or organization whether members of the Exchange or not until such person, firm, corporation or organization shall have signed in duplicate an application in writing addressed to the Telegraph Company in substantially the following form, and the applicant shall have been approved by the Exchange (R. 26).

One of said applications when signed shall be delivered to the [fol. 58] Exchange, but said application and the acceptance thereof by the Telegraph Company shall not be effectual for

any purpose until the applicant shall have been approved by the Exchange. Notice shall be given as promptly as possible by the Exchange of its approval or disapproval of the applicant.

The Telegraph Company may furnish any quotations furnished to it hereunder to its customers at intervals of fifteen (15) minutes or more without requiring such customers to sign the said application form (R., 29).

The Telegraph Company agrees that its right to furnish said continuous quotations to any person, firm, corporation or organization shall cease and determine immediately upon receipt of a notice in writing from the Exchange to cease and discontinue furnishing said continuous quotations to such person, firm, corporation or organization, and the Telegraph Company agrees that immediately upon receipt of such a notice from the Exchange it will issue instructions to its employees to comply therewith and cease and discontinue furnishing said continuous service to such person, firm, corporation or organization, and will see that such instructions are complied with; Provided, however, that the Telegraph Company shall not be required to remove any of its tickers or wires or to discontinue service furnished by any other means, which are under restraint by injunction of the courts, during the pendency of such injunction.

Third. The Exchange further agrees to permit the Telegraph Company to collect all quotations, reports and statistics, posted, read off, or announced on the trading floor of the Exchange (other than its continuous quotations) and to use the same wherever it may desire

to do so in its business and to retain all the revenue from the sale thereof.

Fourth. The Exchange agrees that it will not grant the privilege of receiving and transmitting or using nor will it furnish to any [fol. 61] person, party, firm or corporation other than the Telegraph Company and the Postal Telegraph-Cable Company any quotations originating on the floor of the Exchange or any other quotations, reports or statistics, posted, read off or announced on said floor, nor will the Exchange so far as it can lawfully prevent the same, permit, suffer or allow any of its members, employees or other persons to transmit, distribute or deliver for sale any of the said continuous or other quotations, reports and statistics, as hereinbefore provided, nor will the Exchange do any act whereby any other person, firm or corporation other than the Telegraph Company party hereto and the above-mentioned Postal Telegraph-Cable Company shall acquire any right to receive, use, transmit or deliver for sale or distribution any of the said continuous or other quotations, reports and statistics.

The Exchange may grant to the said Postal Telegraph-Cable Company (hereinafter termed the Postal Company) the same right to receive and transmit the aforesaid continuous or other quotations, reports and statistics, only as is hereby granted to the Telegraph Company, and in that case the exchange shall require said Postal Company to execute a contract upon practically the same terms and conditions all and singular and in the same manner as herein set forth, except as to the amount to be paid thereunder, which shall be a sum

not less than $4,000 per annum, payable in cash, so long as no greater use of said matter is made by said Postal Company than at present; it being understood and agreed that in case said Postal Company shall at any time actively compete with the Telegraph [fol. 62] Company in distributing and selling said matter, the Exchange shall require said Postal Company to pay the same price therefor as is herein agreed to be paid by the Telegraph Company, such increase to be effective after the close of the current contract year; and it being further understood and agreed that the said Postal Company shall not sell or dispose of the continuous quotations, reports and statistics to any Exchange or Board of Trade in the United States, unless and except the said Postal Company competes actively with the Telegraph Company and pays to the Exchange the same amount as herein agreed to be paid by the Telegraph Company (R., 31).

Fifth. As compensation for the privilege of receiving and serving said continuous and/or other quotations, reports and statistics, hereby granted by the Exchange to the Telegraph Company, the Telegraph Company agrees to pay to the Exchange the sum of Twenty-seven thousand five hundred dollars ($27,500.00) per annum in equal [fol. 64] installments of Two thousand two hundred and ninety-one and 66/100 dollars ($2,291.66) at the close of each month during the continuance of this agreement; and in case the Telegraph Company shall make default in the payment of any such installment for the period of thirty days after the same becomes due, the Exchange may forthwith terminate such privilege without notice.

Sixth. The Telegraph Company further agrees to furnish to the Exchange daily (Sundays and holidays excepted unless especially requested by the Exchange to furnish the service on an Exchange holiday) and to deliver by Morse wire connected with the office of the Exchange in New York City, such quotations and reports of domestic cotton markets, such reports on the movement of cotton and such governmental reports on the weather, on cotton condition, acreage, yield and ginning as the Exchange may from time to time require; also such other reports, issued by the Government or otherwise, as may be specially required by the Exchange and which the Telegraph Company may be able to collect or obtain from sources indicated by the Exchange or otherwise. Changes may be made in said service by mutual agreement, both in the character of the reports and in the place of origin; provided that in all cases where extra expense shall be incurred by the Telegraph Company in the collection or transmission of reports required by the Exchange, such extra expense shall be paid by the Exchange, but shall be subject to the approval of the Exchange before it is incurred (R., 32).

The appellant moved for a preliminary injunction on the amended bill (R. 12). And defendants moved for a preliminary injunction on the counterclaim (R. 40). Plaintiff's motion was denied. and defendant's motion was granted (R. 48).

Judge Learned Hand handed down an opinion on the counterclaim (R. 50). From the orders entered on the foregoing motions, plaintiff prosecuted an appeal to the United States Circuit Court of Appeals for the second Circuit.

On the hearing of such appeal, the said appellate court affirmed the order of the district court and directed the dismissal of the plaintiff's amended bill (R. 70).

From this decree, appellant has prosecuted an appeal to this court and has assigned the following:

ERRORS.

Now comes Frank Moore, President of the Odd-Lot Cotton Exchange of New York, complainant in the above numbered and entitled cause, and in connection with his petition for an appeal in this cause, assigns following errors which the appellant avers were committed upon the hearing and decision hereof, and upon which he relies for a reversal of the decision of the United States Circuit Court of Appeals for the Second Circuit.

FIRST: The Court erred in holding that the facts stated in the amended bill of Complaint failed to show that the subject matter of the suit affects or involves Interstate Commerce or presented any Federal Question under the Federal Anti Trust Laws or otherwise sufficient to give the trial Court jurisdiction of the suit, and for that reason dismissing complainant's amended bill.

SECOND: The Court erred in holding that under the facts alleged the New York Cotton Exchange has no monopoly of cotton quotations in the United States and therefore has the right to select its customers.

THIRD: The Court erred in holding that the New York Cotton Exchange can control the use

of its quotations as it chooses, even though it is a monopoly, and pursuant to a conspiracy with and among its members can withhold them from people engaged in interstate buying and selling cotton and thereby make it impossible to conduct their business.

FIFTH: The Court erred in not holding that the quotations of the prices of cotton disseminated by the defendants are a part of and directly affect interstate commerce.

SIXTH: The Court erred in holding that the contract between the New York Cotton Exchange and the Western Union Telegraph Co. is a lawful agreement.

SEVENTH: The Court erred in holding that in the sale of its quotations to the Western Union Telegraph Company a restriction on the resale or other disposition of such quotations, by the Western Union Telegraph Company, to such persons only as might be approved by the New York Cotton Exchange, was legal and a reasonable restriction on Interstate Commerce.

EIGHTH: The Court erred in holding that under the contract between the New York Cotton Exchange and the Western Union Telegraph Company, the Western Union Telegraph Company merely became and acted as the agent of the New York Cotton Exchange for the distribution of the Exchange's cotton quotations, and therefore could lawfully contract with the Exchange to restrict a resale of such quotations, acquired under

such contract, to such persons only as the Exchange would approve.

NINTH: The Court erred in holding that the Amended Bill of Complaint does not allege or show a violation of the Federal Anti Trust Laws.

TENTH: The Court erred in holding that the trial Court has jurisdiction of the counterclaim for the reason that the Amended Bill and counterclaim relate to the same subject matter, there being no diversity of citizenship and the Court having dismissed the amended bill of complaint for lack of jurisdiction of the subject matter.

ELEVENTH: The Court erred in holding that the amended bill of Complaint and the counterclaim relate to the same subject matter, and in effect holding that they arise out of the same transaction and therefore need not show jurisdiction of the counterclaim independently, while as shown by the Amended Bill of Complaint, plaintiff seeks to enforce a right under the Interstate Commerce and Anti Trust Laws, while the counterclaim seeks to enjoin plaintiff from unlawfully purloining and using defendant's cotton quotations.

TWELFTH: The Court erred in entering the order and decree directing the District Court to enter final judgment and decree for a permanent injunction against complainant for the reason that when the Court determined that the facts of the Amended Bill of Complaint failed to show Federal Jurisdiction, the Court thereupon lost further jurisdiction over the subject matter, and in order-

ing the dismissal of the Amended Bill of Complaint should have ordered a dismissal of the counterclaim.

THIRTEENTH: The Court erred in directing the District Court to enter a final injunction against Complainant on the Counterclaim for the reason that the New York Cotton Exchange quotations are impressed with a public use, and the members of the Odd Lot Cotton Exchange have a right to know what they are, and to make any unlawful use thereof.

FOURTEENTH: The Court erred in directing the District Court to render a decree of final injunction against complainant because as shown by the pleadings and proof the complainant does not receive the quotations of cotton prices until after their dissemination by defendants throughout the United States and after they are impressed with a public use.

FIRST ASSIGNMENT OF ERRORS.

(Grouping First, Fifth and Ninth.)

FIRST: The Court erred in holding that the facts stated in the amended bill of complaint failed to show that the subject matter of the suit affects or involves Interstate Commerce, or presented any Federal question under the Federal Anti Trust Laws, or otherwise sufficient to give the trial Court jurisdiction of the suit, and for that reason dismissing complainant's amended bill (R. 72).

FIFTH: The Court erred in not holding that the quotations of the prices of cotton, disseminated by

the defendants, are a part of and directly affect interstate commerce (R. 72).

NINTH: The Court erred in holding that the amended Bill of complainant does not allege or show a violation of the Federal Anti Trust Laws (R. 73).

ARGUMENT.

The substance of the appellant's bill, as heretofore set out, is that the New York Cotton Exchange is organized as a membership corporation, conducting an exchange in the City of New York, with a membership who trade and deal in cotton, both spot and future, and that all of the prices which are bid, and paid, for such cotton are gathered by the Exchange, and such quotations are known as the continuous cotton quotations. The exchange obtains, and furnishes, for the use of its members all cotton statistics. That is to say, the prospective cotton crops, conditions of the cotton, weather conditions, the probable amount of shipment, and transportation, and consumption of cotton the world over. These data are furnished to the exchange, exclusively, by the Western Union Telegraph Company, and are gathered by the telegraph Company by its local agents in all parts of the United States. The New York Cotton Exchange, under its written contract with the Western Union Telegraph Company, furnishes such quotations to the said Western Union Telegraph Company, exclusively, and in consideration for the exclusive right to the said quotation, the Western Union Telegraph Company pays to the New York Cotton Exchange, annually, the sum of $27,500. in addition to furnishing the said exchange with the data above men-

tioned. These quotations are then sold by the Western Union Telegraph Company, and transmitted to its customers the country over by means of its telegraph wires and tickers. That these quotations govern the price of cotton for sale, delivery, and transportation in Interstate Commerce, and in the usual course of business, only such persons as are furnished quotations by the Western Union Telegraph Company can transact such cotton business in either spot and futures.

The appellant, The Odd Lot Cotton Exchange, also conducts an exchange in the City of New York, and in order to enable its members to transact business in the purchase and sale of cotton, and in dealing with their customers in the Southern States, must have the use of these quotations and cannot conduct business without them.

Appellant contends that, under the circumstances, the continuous cotton quotations, as made and issued by the New York Cotton Exchange, are an instrumentality of Interstate Commerce as much so as a railroad car or a telegraph wire. It is true that the cotton sought to be bought and sold is not yet in transit in interstate commerce but its initiation as interstate commerce depends upon the use of these quotations, which the appellees furnish to appellant's competitors, but deny to appellants, and hence restrain the appellant from competing in such interstate commerce.

The appellees contend that these quotations arise out of local transactions conducted on the floor of the New York Cotton Exchange and therefore the quotations themselves are matters of local concern and do not directly affect interstate commerce.

It cannot be a matter of any importance as to how these quotations arise as the question here is not whether the quotations arise out of local transactions or otherwise, but the nature and functions of the quotations themselves, after they have been created, and become a distinct property of instrumentality. The fact that the quotations arise out of local transactions can have no greater bearing upon the question as to whether they constitute interstate Commerce, than the fact that cotton shipped in Interstate commerce has been grown on a plantation within the state as a local production.

Plaintiff's bill was directed to be dismissed by the Circuit Court of Appeals on consideration of the motion for a preliminary injunction and therefore must be treated as if it had been ordered stricken out on motion for want of equity or failure to state facts sufficient to show that a question of Interstate Commerce was involved, and for the purposes of considering the sufficiency of the bill all of its allegations must be taken to be true without regard to any defensive matter set up in the answer.

The fact that these quotations arise out of local transactions does not appear in the bill but is matter set up in the answer for defensive purposes.

The Learned Circuit Court of Appeals however in directing the dismissal of the bill bases its conclusion mainly upon the facts stated in the answer, as will appear from its opinion from which we quote the following:

> "The contracts made on the New York Cotton Exchange are made in the Board room of the Exchange in the City of New York, and they provide that the Cotton is deliverable from

> licensed warehouses in the port of New York. There is no obligation to make delivery at any place except in the Port of New York. Such transaction is local in its character and does not involve Interstate Commerce. The decisions of the Supreme Court makes this clear."

and in support of this statement cites the cases of

> *Hopkins vs. U. S.* 171 U. S. 578;
> *Anderson vs. U. S.* 171 U. S. 604;
> *Ware & Leland vs. Mobile County,* 209 U. S. 405;
> *Hill vs. Wallace,* 259 U. S. 44.

and then concludes:

> "But we find nothing in *Stafford vs. Wallace, supra,* or in *Chicago Board of Trade vs. Olson,* or in any decision of the Supreme Court which supports the complainants contention that the New York Cotton Exchange is engaged in interstate commerce. Neither are we cited to any act of Congress which entitles the complainant to maintain its bill, and we conclude that the bill itself must be dismissed."

If this suit involved the enforcement of any contract of sale made on the Floor of the New York Cotton Exchange of the nature quoted by the learned Court of Appeals, then we agree that the Court's conclusion would have been logical, but the Court is misled in its conclusion by the consideration of the question whether or not the New York Cotton Exchange is engaged in the trans-

action of Interstate Commerce by reason of the dealings made on the floor of the Exchange.

The gravamen of the complaint set out in the bill is, that the New York Cotton Exchange in formulating the quotation of actual transactions and selling the quotations to individuals, and other exchanges in the State of New York, and in other States of the United States, for use in purchase, sale, and transportation of cotton is engaged in Interstate Commerce as to these particular quotations, which is an entirely different question from transactions taking place on the board of the exchange.

The Western Union Telegraph Company, having acquired the exclusive right to such quotation, is engaged in selling the same in all states of the United States where dealings and transportation of cotton is concerned, and transmitting such quotations over its wires in the United States, and is engaged in Interstate commerce with reference to these particular quotations. Therefore the cases cited by the learned Court of Appeals are not applicable to the facts in this case.

The *Hopkins* and *Anderson* cases have often been considered by this Court, and discussed, and have been narrowly limited to the facts of those cases. In the *Hopkins* case it has been shown the agreements merely regulated the conduct of brokers among themselves, fixing charges and regulations for services rendered by them in handling cattle in the Kansas City Stock Yards. The Court held it in no wise affected the Interstate Commerce of cattle shipment to Kansas City.

The *Anderson* case was of the same nature and held not to affect Interstate Commerce. These

cases were discussed by this Court in *Stafford vs. Wallace,* 259 U. S. 44; and *Swift vs. U. S.* 196 U. S. 375.

In commenting on those cases this Court says,

> "If they had been connected with a general scheme to control shipments and prices in yards, they would have been a part of the general Interstate Commerce."

In *Chas. A. Ramsay & Co. vs. Associated Bill Posters,* 260 U. S. 501, this Court held that combinations among all bill posters to regulate the price for services in displaying posters, though local in their various districts, it being agreed among them however that bill posters in all parts of the country would charge the same price for services, and thus preventing competition among the various localities did constitute interstate commerce and that such combination created a monopoly and did place a restraint on Interstate commerce.

The case at bar is a much stronger case than the one last referred to, and comes within the decisions quoted above, and in the recent cases of *Binderup vs. Pathe Exchange,* 263 U. S. 491. While the answer is not under consideration yet as a matter of argument we refer to section 8 of the defendant's answer (R., 15) in which the defendant states:

> "This defendant admits that in order that its members may carry on the said business as aforesaid it is necessary that said Odd Lot Cotton Exchange or its members should have the continuous quotations of this defendant."

This of course applies to any and all dealers in cotton except members of the New York Cotton

Exchange and such persons as are supplied with the quotations by the Western Union Telegraph Company. The effect is that no person can transact cotton business, in interstate commerce, without use of the continuous quotations of the New York Cotton Exchange, and thus Interstate Commerce in cotton is directly and wholly controlled, affected, and monopolized by the New York Cotton Exchange and The Western Union Telegraph Company through the continuous quotations of the exchange.

It is our contention therefore that these continuous quotations of the New York Cotton Exchange are instrumentalities of Interstate Commerce, and their use and disposition is directly controlled by the Sherman Anti Trust Laws, and the Clayton Act.

SECOND ASSIGNMENT OF ERROR.

(Grouping Second and Third.)

Second: The Court erred in holding that under the facts alleged the New York Cotton Exchange has no monopoly of cotton quotations in the United States and therefore has the right to select its customers (R. 72).

Third: The Court erred in holding that the New York Cotton Exchange can control the use of its quotations as it chooses, even though it is a monopoly, and pursuant to a conspiracy with and among its members can withhold them from people engaged in interstate buying and selling cotton and thereby make it impossible to conduct their business (R. 72).

ARGUMENT.

Assuming that the continuous cotton quotations of the New York Cotton Exchange are instrumentalities of interstate commerce, as we have contended under the first assignment, then the appellant contends that the New York Cotton Exchange has monopoly of such quotations and that the appellant has the right to enjoin the continuation of such monopoly so far as it affects the appellant. Upon this issue the appellant charges that the defendant, the New York Cotton Exchange, has a monopoly of the receipt, and dissemination, of the cotton price quotations on the markets of the world, and in the establishment, and dissemination, of cotton price quotations in the City of New York, and by these quotations the price of cotton, both spot and for future delivery, are influenced, guided, and fixed in all exchanges, and markets, of all the States of the United States. Appellant further alleges that cotton, as a commodity, is of great value, aggregating, in the United States alone, from Seven hundred Million Dollars to approximately a Billion Dollars in the raw state, and in the course of Interstate Commerce and manufacture, and trade, rises in value to many times that sum. That such commodity is sold, traded in, and transported into and through the various States of the United States of America, and to foreign countries. That large quantities of cotton are also grown in Egypt, India and other parts of the world, and come in competition with the cotton grown in the United States, particularly in the markets of the British Empire, the European Continent, and the Oriental countries. That the trade, commerce, and manufacture of cotton into articles of commerce, has become so extensive that a fraction of

a cent difference in the market value or price of such cotton represents large amounts of profit or loss, so that commercial custom has reduced trading to prices fixed continuously during the business hours of the day; and that all trading and dealings in cotton both spot, that is to say, for immediate delivery, and future, or cotton to be delivered at some future date, are governed by quotations as hereinafter set out, made continuously during the trading day. That such custom of buying, selling and trading in cotton upon continuous quotations has grown and developed by many years of custom and practice, so that such trading upon quotation controls the price of the raw product in the hands of the grower, as well as in the hands of the spinner or manufacturer. That the value of cotton produced the world over is constantly controlled by the probable supply, and the probable demand, or consumption, and this supply and demand is constantly changing. The supply, by area planted, changing weather conditions increasing or retarding its growth, and destruction by insects. So that the dealing, trading in, and transportation of, cotton in the United States and foreign countries is controlled by the instrumentalities for gathering information as to supply and demand, and prices resulting therefrom on the markets where such trading and dealing is carried on. That the dealer in spot cotton relies on the current quotations as a basis of value for buying and selling for such immediate delivery and the spinner, manufacturer or consumer relies upon such quotations for his immediate deliveries as well as future deliveries. That the spinners and manufacturers have become accustomed to and are required, by reason of competitive conditions, to make contracts for the purchase and delivery of their cotton for

the probable amount required during the year's cotton season. That in making such contracts, they are compelled to rely upon the current quotations and while carrying such contracts, the price of such future delivery cotton may on any day greatly change by reason of the conditions before set out, which could not have been anticipated. That by reason of such changes, the purchaser of such cotton for future delivery must be kept informed of the quotations and the probable supply and demand as aforesaid so that he may have a free market in which to make sale of cotton bought at excessive prices to avoid heavy damage and probably bankruptcy.

That the defendant, The New York Cotton Exchange, has been for many years engaged in the business of gathering the information as to the actual and probable supply and demand for cotton the world over. That the information as to the Egyptian and Indian cotton production as well as the probable British, Continental European, and Oriental demand is generally concentrated by like system in Liverpool, England, and the prices fixed in the cotton trade in the United States is in a large measure influenced by the continuous quotations of the Liverpool Exchange. And that the defendant, the New York Cotton Exchange, has the exclusive control, by an arrangement with the Liverpool Exchanges, of such continuous quotations and that by reason thereof controls the price quotations, which is the chief instrumentality in the control and handling of trade and commerce in cotton among all the States of the United States and largely in foreign countries. That by reason of the control of such information it is enabled to continuously supply its own members with such information to the exclusion of all other dealers, traders in, or owners, or purchasers of cotton.

That by reason of such information, and the exclusive advance information as to the prices on the Liverpool Exchange, the members of said New York Cotton Exchange are enabled to deal in, buy, and sell, spot as well as future cotton, and the prices at which such dealings are made continuously during the day become the official quotations of said New York Cotton Exchange, and such quotations, by reason of its combination with its members, become the property of the said defendant, The New York Cotton Exchange. That the said defendant, The New York Cotton Exchange, thereby obtains exclusive control of such quotations and is engaged in the business of selling such quotations.

That the trading in cotton is, by fixed custom and practice, carried on continuously during the day on quotations disseminated as aforesaid, and therefore the telegraph lines have become a necessary, and substantially, an exclusive instrumentality for communicating to all dealers and traders in all of the States such quotations, and information, as are given out by the said New York Cotton Exchange. That by reason of the control and ownership of such quotations by the said defendant, the New York Cotton Exchange can and does prohibit the defendant, The Western Union Telegraph Company and the Gold & Stock Telegraph Company from communicating or delivering its said information and quotations to any person or corporation except such as may be designated by the said New York Cotton Exchange.

That by reason of the control of the said instrumentalities of commerce, the said defendant, the New York Cotton Exchange, can and does influence and control all dealing, trading, and commerce in cotton in the United States, and to a large extent in foreign countries, and has thereby monopolized the cotton commerce in the United

States, and that the free competitive flow of Interstate Commerce in such product is hampered, restrained and monopolized by the said defendants.

The Sherman Act provides as follows:

> "Section 1. Every contract combination in the form of trust, or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared illegal * * *.
>
> Section 2. Every person who shall monopolize or attempt to monopolize or combine or conspire with any other person or persons to monopolize any part of the trade or commerce in the several States shall be deemed guilty of a misdemeanor. 26 Stat. 209."

The Clayton Act authorizing the issuance of injunctions to prevent the establishment and operation of monopolies is supplementary to the Sherman Act.

> *Standard Sanitary Manufacturing Co. vs. U. S.*, 226 U. S. 20.

The allegations of appellant's bill as above set out which, for the purposes of this appeal must be accepted as true, show a state of facts demonstrating, beyond cavil, that the continuous quotations made up, and issued by the New York Cotton Exchange, for the use of its members, and such other persons to whom the said New York Cotton Exchange may sell such quotations, constitute an absolute monopoly of the sale and transportation of cotton in Interstate commerce, and that by confining such quotations to its members and its selected customers, the New York Cotton Exchange restrains and prevents all competition in the cot-

ton industry. It is conceded, and as we have heretofore set out, the appellees admit, that no person can conduct such business without the use of such quotations. Upon this issue the learned Circuit Court of Appeals says:

> "The New York Cotton Exchange has the property right in the quotations which it collects. As such owner the Exchange is under no legal duty to sell its quotations to any particular person nor to all, because it sells to some. These quotations relate solely to the business of the Exchange which is under no obligation to communicate them" (R., 64).

It may be conceded, as settled by a number of authorities, that these quotations are property, but such property is of no higher standing than any other property, even patented or copyrighted. It may also be conceded that "as such owner the Exchange is under no legal duty to sell its quotations to any particular person," but we do not concede the further conclusion of the learned Appellate Court that under no condition is it bound to sell "to all because it sells to some."

We contend that when the Exchange engages in the business of selling its quotations it cannot lawfully discriminate in such a manner as to produce a monopoly in the cotton industry.

In *Paten vs. U. S.*, 226 U. S. 525, it was held, in substance, that Paten had the inalienable right to buy and sell cotton, but he had not the right to buy sufficient to corner cotton or create a monopoly. The very essence of the Anti-Trust Law is that no man shall use his own property or exercise his inalienable rights in such a manner as to produce a monopoly.

As we have heretofore shown, the New York Cotton Exchange has, by virtue of the ownership of the continuous cotton quotations produced a monopoly of the business of buying, selling and transporting cotton. That the power to so monopolize the business is placed, by the Cotton Exchange, in the hands of its members and such other persons as it may select, and to whom it does serve such quotations. The sale and service of such quotations constitute a monopoly. This right to monopolize the business we deny under the Anti-Trust Laws. It is a fact of common knowledge that the Cotton Exchange limits the continuous quotations to their own members and restrict their use entirely to such members, thus limiting the transaction of the cotton business to such members. The evidence of the monopoly value of such membership is obvious from the fact that such memberships are sold in the New York Cotton Exchange at fabulous prices. If all persons were free and unrestrained in the transaction of cotton business with equal right to the use of the New York Cotton Exchange quotations, the membership in a cotton exchange would have no monopoly value. No such prices would be paid for memberships if such members were compelled to deal upon equal basis with dealers in cotton who were not members.

The learned Court of Appeals in support of its opinion, and conclusion in this case relies upon the rule of reason, or pragmatic legal philosophy, applied in *Standard Oil Co. vs. U. S.*, 221 U. S. 1; and *U. S. vs. American Tobacco Co.*, 221 U. S. 106. We entirely agree with the court in the application of the rule in the cases referred to, but it can have no application to the case at bar. In the instant case an unquestioned monopoly is established,

and the rule of reason is opposed to its support and continuance. It is common public knowledge that constant complaints have been made by cotton producers against the system of cotton exchange speculations in cotton, causing rises and falls in market values without adequate reason based on supply and demand. Efforts have been made, from time to time, to, in some manner, destroy or control such speculations but thus far without avail.

The courts, in conformity with the pragmatic philosophy, are meeting such just complaints half way, and are making the legal rules sufficiently flexible to meet the just criticisms of the failure of the courts under the rule of *stare decisi* to apply the law to the changing economic conditions. This is the first occasion, so far as we have been able to find, upon which, the question of the monopoly of the cotton business created by the continuous quotations of the exchange, has been before this court. And we feel that it is an occasion which should be utilized, in pursuance of the Anti-Trust Laws, to break up the monopoly, to free the cotton business from this restraint, and force full and free competition in dealing in cotton.

While we contend that the production of the continuous cotton quotations by the Exchange and selling such quotations to its members, and restricting the absolute use thereof to its members, and to such other persons as it may select, is itself a monopoly, and conspiracy to restrain commerce, and to restrict competition, yet we will more fully treat of this subject in connection with the specific contract entered into between the New York Cotton Exchange and the Western Union Telegraph Company, by which the resale of such quotations by the Western Union Telegraph Company, a pub-

lic service corporation, is specifically restricted so as to continue the monopoly we have complained of, if not in fact to itself constitute a monopoly.

THIRD ASSIGNMENT OF ERROR.

(Grouping Sixth, Seventh and Eighth.)

SIXTH. The Court erred in holding that the contract between the New York Cotton Exchange and the Western Union Telegraph Company is a lawful agreement (R. 72).

SEVENTH. The Court erred in holding that in the sale of its quotations to the Western Union Telegraph Company a restriction on the resale, or other disposition of such quotations by the Western Union Telegraph Company, to such persons only as might be approved by the New York Cotton Exchange, was legal and a reasonable restriction on Interstate Commerce (R. 72).

Eighth. The Court erred in holding, that under the contract between the New York Cotton Exchange and the Western Union Telegraph Company, the Western Union Telegraph Company merely became, and acted as, the agent of the New York Cotton Exchange for the distribution of the Exchange's cotton quotations, and therefore could lawfully contract with the Exchange to restrict a resale of such quotations, acquired under such contract to such persons only as the exchange would approve (R. 72).

ARGUMENT.

Under this assignment, the appellant's bill alleges that the Western Union Telegraph Company is a public service corporation engaged in interstate commerce by transmitting messages for the

public by means of telegraph and cable wires among the various States of the United States, and between the said States and Territories of the United States, and that it is organized and chartered as such telegraph company by and under the laws of the State of New York (R., 1).

That all contracts of purchase and sales of cotton made and executed by the members of the Odd Lot Cotton Exchange have been, and are, made upon orders transmitted by the defendant, the Western Union Telegraph Company, by wire, and all reports concerning an affirmance of such sales by said members are likewise transmitted by the Western Union Telegraph Company (R., 3).

That for the purpose of conducting its business the continuous cotton quotations, as issued by the New York Cotton Exchange, are necessary, and that for the purpose of obtaining such quotations the appellants applied to the Western Union Telegraph Company, and offered to pay whatever charges might be made and exacted therefor, and to comply with all requirements of the defendant's, and is ready, able and willing to pay such charges and to comply with all requirements. The said Western Union Telegraph Company informed the appellants that such application could not be granted except upon the express consent of the New York Cotton Exchange, and that since the application was made the New York Cotton Exchange had failed and refused to give its consent thereto (R., 5).

That the New York Cotton Exchange, with the purpose of monopolizing commerce in cotton, has entered into, and now has a contract with the defendant, the Western Union Telegraph Company, by which the New York Cotton Exchange gives to the Western Union Telegraph Company, for itself and its subsidiary, the Gold & Stock Telegraph

Company, the ownership and exclusive right to sell and disseminate the said continuous cotton quotations.

That by the terms of said contract the New York Cotton Exchange reserved unto itself the right to choose and designate the persons, business, corporations, or exchanges, to whom the said Western Union Telegraph Company, and the Gold & Stock Telegraph Company shall send, disseminate, and deliver the said continuous cotton quotations, and the Western Union Telegraph Company, acting for itself and the Gold & Stock Telegraph Company, agrees by said contract not to give said ticker service, or said continuous quotations, to anyone except upon the agreement and consent of the New York Cotton Exchange (R., 5).

That as a further instance of the said unlawful purposes on the part of the New York Cotton Exchange, it prohibits its members, as well as all persons to whom such quotations are sold, or served, from imparting to any person under any conditions such quotations (R., 9).

The contract referred to provides, among other things, that the said Western Union Telegraph Company may furnish said quotations, in whole or in part, to its customers by means of tickers or by telegraph, or telephone wires and instruments, or by messages, subject to the limitations, conditions and restrictions of the agreement.

The Telegraph Company, in relaying said quotations to its offices and customers, shall use its utmost endeavors to prevent the tapping of any wires and to prevent all persons from obtaining such quotations from its employees (R., 25).

The said Telegraph Company shall have the right to serve said quotations to members of the exchange, or to any firm of which the member of the exchange is a partner, at their offices, or branch

offices, and shall charge such members of the exchange, or their firm, for the use of tickers, delivering such quotations in their offices in New York City, not exceeding $25.00 per month and $30.00 per month for each ticker installed in Chambers Street, and $35.00 for each ticker installed between 60th and 125th Streets (R., 26).

That the Telegraph Company shall not under any circumstances, directly or indirectly, furnish said continuous cotton quotations to any person, firm, corporation or organization, whether members of the exchange or not, until such person, firm, corporation, or organization shall have signed, in duplicate, an application in writing addressed to the Telegraph Company in substantially the form set out in the contract (R., 27).

One of said applications when signed shall be delivered to the exchange, but said application and the acceptance thereof by the Telegraph Company shall not be effectual, for any purpose, until the applicant shall have been approved by the exchange. Notice shall be given as promptly as possible by the exchange of its approval or disapproval of the applicant (R., 29).

The Telegraph Company further agrees, that its right to furnish the continuous quotations to any person, or organization, shall cease immediately upon receiving notice from the exchange to discontinue such service (R., 30).

The Telegraph Company shall also have the privilege to use, free of any additional charge, all quotations, reports, and statistics posted, read or announced on the floor of the Exchange (R., 30).

The Exchange further agrees, that it will not grant the privilege of receiving and transmitting, or using, nor will it furnish any person, party, firm or corporation, other than the Telegraph Company,

and the Postal Telegraph Company, any quotations originating on the floor of the Exchange, or any other quotations, reports, or statistics, posted, read off or announced on said floor, nor will the Exchange, so far as it can lawfully prevent the same, permit or allow any of its members, employees, or other persons, to transmit, distribute, or deliver for sale, any of said continuous or other quotations, reports and statistics, as herein provided, and will not permit any person, except said Telegraph Company, to acquire any rights to, or interest in, such quotations or statistics.

The Exchange reserves the right to grant the Postal Telegraph Company the privilege of acquiring all such quotations, and statistics, upon the same premises, and subject to the same contract made with the Western Union Telegraph Company (R., 31).

As compensation for the privilege of receiving and serving such continuous, and other, quotations granted by the Exchange to the Telegraph and Telephone Company, the Telegraph Company agrees to pay the Exchange the sum of $27,500 per annum, payable in monthly installments (R., 32).

The Telegraph Company agrees to furnish the Exchange, and deliver at its office in New York, such quotations and reports of domestic cotton markets, reports on the movement of cotton, and such government reports on the weather, on cotton condition, acreage, yield and ginning as the Exchange may from time to time require, and such other reports issued by the Government, or otherwise, as may be specially required by the Exchange, and which the Telegraph Company may be able to collect, or obtain, from sources indicated by the Exchange, or otherwise (R., 32).

Assuming again that the continuous cotton quotations are instrumentalities of Interstate Commerce, and have been dedicated to that service by the voluntary act of the owner, the New York Cotton Exchange, appellant contends that any act of such owner, or in combination with any other person, or persons, or corporations, tending to create a monopoly in the cotton industry, or imposing a burden upon, or restriction in, the free flow of commerce in such industry among the States of the United States, constitutes a violation of the Sherman Anti-Trust Law, and may be enjoined under the Clayton Act.

In *Straus vs. Victor Talking Machine Co.*, 243 U. S. 490, the defendant company sold its machines for a price fixed which passed the title in the machine to the purchaser. The machine being patented the vendor, for the purpose of maintaining the market price of its machines, sought to limit the sale of its machines to such dealers as it "licensed", and a license was granted to such dealers and purchasers only as would maintain the resale price. A notice of such "license" and the right of a purchaser to a machine subject to such conditions was attached to each machine. Straus was not a licensed dealer but purchased machines from a licensed dealer, and sold them for less than the resale price set by the vendor. The vendor sought to enjoin Straus from dealing with such machines in violation of the terms of the license notice.

It was held by this court, First, that the right to a monopoly of the manufacture, sale and use of patented articles ceased when the patentee, or his assigns, parted with all title to, and interest in the patented article.

Second, That every scheme whereby the vendor of property, who parted with all of his title to

and interest in such property, sought to retain control of the resale, or use of such property, was void and a violation of the Sherman Anti-Trust Law. In the opinion in that case Judge Clark, speaking for the court, condemns all such transactions in these stimulating words:

> "Courts would be perversely blind if they failed to look through such an attempt as this license notice, this plainly is to sell property for a full price, and yet to place restraints upon its further alienation, such as have been hateful to the law from Lord Cokes day to ours, because obnoxious to the public interest."

The principle here laid down has been followed by this court, and if anything amplified in its application to a large variety of facts in the following cases:

Strauss vs. American Publishers' Assn., 231 U. S. 222;
U. S. vs. Shrader's Sons, 252 U. S. 85;
American Column Co. vs. U. S., 257 U. S. 377;
Standard Sanitary Mfg. Co. vs. U. S., 226 U. S. 20;
Frey & Sons vs. Cudahy Pack. Co., 256 U. S. 208;
U. S. vs. American Oil Co., 262 U. S. 371;
Miles Medical vs. J. D. Park & Sons, 220 U. S. 373;
Bauer vs. O'Donnell, 229 U. S. 1;
Standard Fashion Co. vs. Magrame, 258 U. S. 346;
Boston Store vs. Amer. Graphaphone Co., 246 U. S. 8.

An analysis of the *ratio decidendi* of all the cases results in this: that contracts fixing prices, or conditions, for resale of property are not only contrary to the general law and void, but there is no power to make them, because of their monopolistic tendencies, even in a patented article.

In the instant case, under the contract, the New York Cotton Exchange has sold the continuous cotton quotations to the Western Union Telegraph Company for the sum of $27,500 per annum. The Western Union Telegraph Company is authorized to resell the quotations at any price it sees fit, excepting, however, the members of the New York Cotton Exchange, to whom the resale price is fixed. The New York Cotton Exchange has no pecuniary interest in such resale. It has parted with its title to the quotations. It has, however, reserved the right to select the persons to whom the Western Union Telegraph Company may resell such quotations. The reservation is arbitrary and not in anywise conditional. The contract contains provisions prohibiting the sale and service of the quotations to or for the use of bucket shops, etc., but in no wise affect or limit the arbitrary power of the New York Cotton Exchange to select the purchasers, and users, under resale by the Western Union Telegraph Company.

In *Bauer vs. O'Donnell, supra,* this Court said:

> "The jobber, from whom the appellee purchased, had previously bought, at a price which must be deemed to have been satisfactory, the packages of Sanatogen afterwards sold to the appellee. The patentee had no interest in the proceeds of the subsequent sales. No right to any royalty thereon or to participation in the profits thereof. The packages were sold with as full

and complete title as any article could have when sold in the open market, excepting only the attempt to limit the sale, or use, when sold for not less than one dollar."

It was held that the sale by the patentees released the property from the patent monopoly, and the attempt to restrict the resale was void, and a violation of the Sherman Anti-Trust Law. So in the instant case, the New York Cotton Exchange sold the continuous quotations to the Western Union Telegraph Company for the sum of $27,500 per annum, as said in the *Bauer vs. O'Donnell* case, *supra*, "A price which must be deemed to have been satisfactory."

The New York Cotton Exchange had, as further held in the *Bauer* case, "No interest in the proceeds of the subsequent sales. No right to any royalty thereon or to participation in the profits thereof." Therefore the reservation of the right to select the resale customers is void, and a violation of the Sherman Anti-Trust Law.

In discussing this phase of the case, the learned Circuit Court of Appeals says:

> "These quotations relate solely to the business of the Exchange, which is under no obligation to communicate them, and the Telegraph Company, as its agent, communicates them to those persons to whom the Exchange permits the communication to be made. In this we find no illegality.
>
> *Whitwell vs. Continental Tobacco Co.*, 125 Fed. 454;
> *Matter of Renville*, 46 A. D. (N. Y.) 27.

So far as the contract limits the right of the Telegraph Company to communicate the quo-

tations to such persons as the Exchange approves, we are unable to distinguish this case from that of *Board of Trade vs. Christie Co.*, 198 U. S. 236. That case involved a contract made by the Chicago Board of Trade with the Telegraph Companies for the distribution of its quotations. The Supreme Court held that contracts under which the Board of Trade furnished the Telegraph Company with its quotations on condition that they would only distribute to persons in *contractual relations* with, and approved by the Board of Trade, and not to what are known as bucket shops, were not void as being in restraint of trade either at common law or under the Anti-Trust Act. The Court held the Board of Trade was entitled to an injunction enjoining the defendants from using and distributing the continuous quotations of prices on sales of grain and provisions for future delivery, and which the defendant could not obtain except through a known breach of the confidential terms on which the plaintiff engaged them."

The fallacy of the learned Court's conclusion lies in the premise, assuming the premise to be true that the Telegraph Company is merely the agent of the Exchange to distribute the quotations, then the conclusion that the Telegraph Company was not bound to sell or deliver the quotations to all persons on equal terms, is logical. But the error lies in the fact that the Telegraph Company was not the agent of the Exchange, but by the purchase of the quotations was, and became the owner of them. The Telegraph Company is a *quasi* public service corporation, and when it engaged in the business of selling cotton quotations, and transmitting the same over its wires, became bound, as a

condition of its corporate existence, to furnish such quotations to all persons on equal basis. It cannot as such corporation, engage in such business and discriminate as to the individuals, or associations, to whom it would sell, or transmit such messages. If, for any reason, the Western Union Telegraph Company could not comply with its charter obligation in that respect, then it could not engage in that business at all. As a public service corporation, it was bound to serve all to the extent of its capacity or none.

In *Doty vs. American Tel. & Tel. Co.*, 123 Tenn. 320, it was held that a telegraph company may engage in the ticker business under its charter.

In *Western Union Telegraph Company vs. Foster*, 224 Mass. 365, it was held that the Western Union Telegraph Company, under its charter, could engage in the ticker business, and when it did so, it became subject to its corporate duty to serve all persons demanding ticker service, and on equal terms, and without discrimination.

In *Thomas vs. Ry. Co.*, 101 U. S. 83, it is held that

> "Where a corporation like a railroad has granted to it by charter a franchise, intended, in a large measure, to be exercised, for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions which it undertakes, without consent of the State to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the State, and is void as against public policy."

See also

Transportation Co. vs. Pullman Car Co., 139 U. S. 34,

and this principle has been applied to all *quasi* public service corporations.

Michigan Public Utilities Commission vs. Duke, 45 U. S. Supreme Court Reporter, 191.

In *Telegraph Co. vs. Texas*, 105 U. S. 460, it is held

> "A telegraph company occupies the same relation to commerce as a carrier of messages that a railroad company does as a common carrier of goods."

In the *Renville* case, *supra*, the Court held, in a suit to compel the Western Union Company to serve the Stock Exchange quotations, that the Western Union Telegraph Company paid to the New York Exchange a certain sum of money for quotations for resale to such persons as the Stock Exchange may designate. This, it was held, made the Telegraph Company merely the agents of the Stock Exchange for the transmission of quotations to such persons only as may be designated by the Exchange. This conclusion, however, has not been followed by this court, as will be seen by reference to the cases hereinbefore cited and discussed. Where parties actually parted with the title, but attempted by various schemes to make the purchasers mere agents, or representatives of the vendors, for resale, all such schemes were rejected by this court. In the *Renville* case, the court agrees that if the Telegraph Company had become the

owner of the quotations a different question would have been presented.

The Court, in that case, makes this significant statement:

> "An entirely different question was presented when respondents procured the information themselves, and furnished such information to the public. It may be that under such circumstances, the respondents were bound to furnish the information thus collected to all persons who were willing to comply with the conditions imposed by the respondents as a condition for rendering the service."

We fail to distinguish the difference sought to be pointed out by the Court in that case, between originated and purchased quotations. We cannot conceive how The Western Union Telegraph Company would acquire a lesser title to quotations by purchasing them outright than it would have acquired by gathering the quotations in the first instance. The sole question is one of ownership, and this ownership is the same in both instances. The Court's conclusion in that case, as well as in this case, that the Western Union Telegraph Company became a mere agent, and not the owner of the quotations, cannot be supported by any process of reasoning. Therefore, without regard to any question of monopoly, the appellees were entitled to the quotations, and to compel by mandatory injunction the service of such quotations, appellants having fully complied with all the terms and conditions imposed by the Telegraph Company as a consideration for such services to its other customers.

In the *Christie* case, *supra*, the facts are distinguishable from the case at bar. In that case, the Christie Company was obtaining quotations unlawfully and making unlawful use of them in their business. The Christie Company had not made any application for the privilege of using such quotations, nor did they offer to pay the usual charges, or comply with the usual conditions, for that purpose, and the question of a monopoly of Interstate Commerce did not arise in that case. It further appears from the opinion in that case, that the Western Union Telegraph Company was merely employed to transmit such quotations to such persons as had contractual relations with the exchange, that is, the customer purchased the quotations from the exchange and not from the Telegraph Company, which is not the case here. Therefore, it is not applicable to the facts of this case.

The learned Court of Appeals in its discussion of the contract referred to (R., 63) places stress upon the fact that the contract was intended to prevent the sale, and delivery to, and use of cotton quotations, to bucket shops. The bill states specifically that the appellant's application was refused solely upon the ground that the Cotton Exchange had failed and refused to approve it. The Cotton Exchange sets up in its answer that in its opinion, upon information and belief, the appellants intended to use such quotations in conducting a bucket shop. This is entirely a defensive matter, and not now before this court, and was not before the learned Court of Appeals. We admit that if the quotations were intended for use for such purposes, The Western Union Telegraph Company had the right to refuse to serve them, but the appellants deny that there was ever any intent to conduct a bucket shop and upon this issue of fact

on a trial, they are prepared to make clear and perfect proof, but it is not now an issue on this appeal.

FOURTH ASSIGNMENT OF ERROR.

(Grouping Tenth, Eleventh, Twelfth, Thirteenth and Fourteenth.)

Tenth. The court erred in holding that the trial Court has jurisdiction of the counterclaim for the reason that the amended bill of complaint and counterclaim relate to the same subject matter, there being no diversity of citizenship, and the Court having dismissed the amended bill of complaint for lack of jurisdiction of the subject matter (R. 73).

Eleventh. The Court erred in holding that the amended bill of complaint and counterclaim relate to the same subject matter, and in effect holding that they arise out of the same transaction and therefore need not show jurisdiction of the counterclaim independently, while as shown by the amended bill of complaint, plaintiff seeks to enforce a right under the Interstate Commerce and Anti-Trust Laws, while the counterclaim seeks to enjoin plaintiff from unlawfully purloining and using defendant's cotton quotations (R. 73).

Twelfth. The Court erred in entering the order and decree directing the District Court to enter a final judgment and decree for a permanent injunction against complainant, for the reason that when the court determined that the facts of the amended bill of complaint failed to show Federal jurisdiction, the Court thereupon lost further jurisdiction over the subject matter, and in ordering the dismissal of the amended bill of complaint should have ordered a dismissal of the counterclaim (R. 73).

Thirteenth. The Court erred in directing the District Court to enter a final injunction against complainant on the counterclaim for the reason that the New York Cotton Exchange quotations are impressed with a public use, and the members of the Odd Lot Cotton Exchange have a right to know what they are, and to make any lawful use thereof (R. 73).

Fourteenth. The Court erred in directing the District Court to render a decree of final injunction against the complainant, because, as shown by the pleadings and proof, the complainants do not receive quotations of cotton prices until after their dissemination by defendants throughout the United States, and after they are impressed with a public use (R. 73).

ARGUMENT.

In the case at bar, the jurisdiction of the court is not based upon a diversity of citizenship because all of the parties to the suit are citizens of the State of New York, but the jurisdiction is based solely upon the fact that the matter in controversy affects Interstate Commerce under the Sherman Anti-Trust Laws, and the Clayton Act. The appellees in their counterclaim alleged, in substance, that the appellants are purloining, and using, the continuous cotton quotations of the New York Cotton Exchange, without having acquired from the appellees any authority or right to use the same (R., 22), and pray for an injunction against the appellants from the further use of such quotations. (R. 23), and upon motion the Court granted such injunction, and this order was affirmed by the Circuit Court of Appeals.

The appellant contends that the court had no jurisdiction of the counterclaim because, First, it

does not arise out of any *transaction* between the parties which is the subject matter of the suit. Second, because the counterclaim is not one which might be the subject of an independent suit in equity against the appellant in a Federal court.

Equity Rule 30 provides, "The answer must state, in short and simple form, any counterclaim arising out of the transaction which is the subject matter of the suit, and may without cross bill, set out in said suit a counterclaim against the plaintiff which might be the subject of an independent suit in equity against him. * * *" It will be observed under this rule that there are two conditions upon which a counterclaim or set off may be pleaded for affirmative relief in a suit in equity in Federal court. First, it must arise out of *the transaction* which is the subject matter of the suit. Under this section of the rule, it cannot be seriously contended that the suit by the appellant is upon any *transaction* with the appellee, but is a suit in tort. Nor can it be seriously contended that the appellee's claim arises out of any *transaction* as that also is a suit for a separate tort. It is not sufficient that the matter of the counterclaim should arise out of the same subject matter, but it is limited to a *transaction* which is the subject matter of the suit. Second, if it is contended under the second section of said rule, that the counterclaim is one which might be the subject of an independent suit in equity against him, then to sustain it, it must show independent jurisdiction in a Federal court. First, that it involves more than three thousand dollars. Second, that it arises under some law of the United States, or Third, that there is a diversity of citizenship. It is conceded that there is no diversity of citizenship. Therefore to invest a Federal court with jurisdiction it must arise under some law of the United

States. Purloining quotations in the City of New York, for which an action is brought, certainly does not arise under any law of the United States.

In *Standard Paint Company vs. Trinidad Asphalt Co.*, 220 U. S. 446, this Court said:

> "The opposite parties to the suit are citizens of different States, and while this diversity of citizenship was not necessary to give the court jurisdiction of the case insofar as it involved the validity of the trade mark, it was necessary to give the court jurisdiction of the issue of unfair competition."

In *Ayers vs. Wiswall*, 112 U. S. 190, this Court says that a mere answer cannot confer jurisdiction theretofore absent.

And in *Merchants Co. vs. Clow*, 204 U. S. 290, this Court says, a cross bill like a new action can or may.

In *U. S. Boat Co. vs. Kronche Hardware Co.*, 234 Fed. 868, the defendant pleaded counterclaims for infringement and accounting also for unfair competition. The Court sustained jurisdiction as the infringement covered by the counterclaim, because as stated; the Court had jurisdiction of an infringement suit without diversity of citizenship, but as to the counterclaim for unfair competition it said at page 875, the counterclaims herein are distinguished and independent causes of action, not merely separate grounds for a single cause of action, and that of unfair competition may not be dealt with by the Federal court in the absence of diversity of citizenship.

In *Cleveland Engineering Co. vs. Gallion D. M. Truck Co.*, 243 Fed., at page 407, the Court says:

> "It is true that a set off or counterclaim which is the subject of an independent suit in

equity cannot be sustained, unless some independent ground of Federal jurisdiction is shown to support it. The jurisdiction of the court invoked by complainant in its bill and shown by the allegations thereof does not aid or support the jurisdiction of this court when the defendant brings forward a set-off or counterclaim which may be the subject of an independent suit, and which does not merely concern matters already put in litigation by the original bills. It follows, therefore, in that situation, if there is no diversity of citizenship, or if the subject matter of a counterclaim is not within the jurisdiction of a Federal court, the counterclaim should be stricken out for want of jurisdiction. Equity rules, could not, even if so intended, enlarge the jurisdiction of a court of Equity or of a Federal court."

In *Geneva Furniture Co. vs. Karpen*, 238 U. S. 254, the Court said

> "It hardly needs statement that the jurisdiction as limited and fixed by Congress cannot be enlarged or extended by uniting in a single suit causes of action of which the court is without jurisdiction with one of which it has jurisdiction. Upon this point, the rule otherwise prevailing respecting the joinder of causes of action in suits of equity must, of course, yield to the jurisdictional statute."

Among the numerous cases declaring and applying the principle thus authoritatively enumerated by the Supreme Court are:

> *Cushman vs. Atlantis Fountain Pen Co.*, 164 Fed. 94;

National Casket Co. vs. N. Y. & Bklyn. Casket Co., 185 Fed. 533;
Electric Boat Co. vs. Lake Torpedo Boat Co., 215 Fed. 377;
Johnston vs. Brass Goods Mfg. Co., 201 Fed. 368;
Keasby & Mattison Co. vs. Phillip Carey Co., 113 Fed. 43;
King & Co. vs. Englander, 133 Fed. 416;
Mecky vs. Grabowski, 177 Fed. 591;
Burt vs. Smith, 71 Fed. 161.

Judge Hand, in the District Court (R., 50), says:

> "Under Equity Rule 30, there would concededly be no objection to the counterclaim if substantive jurisdiction existed. However, there is not the necessary diversity of citizenship between the plaintiff and defendant and therefore a counterclaim will lie only if ancillary therein to the main controversy, the rule being incapable of extending constitutional jurisdiction of the District Court, the question therefore is this: Is it necessary to a complete disposition of the subject matter of the bill and to see the protection of the rights involved, if the defendants are correct, that the counterclaim should be entertained?"

And again:

> "The same reasoning lies at the basis of the common law rule that when a court has custody of a *res,* it will entertain all controversies touching claims upon it. The case turns upon an analysis of the pleadings with an eye to this principle. The bill rests upon a tort,

> the refusal of the defendants to furnish the quotations to the plaintiff in pursuance of an unlawful agreement to suppress competition. The right of the defendants to withhold its quotations for other reasons is necessarily conceded, but it has no right to make its refusal a step in a scheme to monopolize the business of dealing in cotton. The answer admits the refusal, but denies that it is a step in any such agreement. It asserts the defendant's right to withhold the quotations from this plaintiff because of other reasons."

It will be observed that Judge Hand concede that the counterclaim does not arise out of the transaction which is the subject matter of the suit, but holds that the bills rest upon a tort, and that the counterclaim rests upon a separate tort. Judge Hand here finds that there is no diversity of citizenship, but ignores the provision of the equity rule that the counterclaim of this case must be dismissed unless it arises out of the *transaction* on which the suit is brought. He proceeds upon the principle that where the court has jurisdiction of the *res*, then it may entertain all controversies, touching claims upon it. Having conceded that the action and counterclaims are both based upon torts, the court could not have acquired jurisdiction of any *res*. And proceeding upon this erroneous premise naturally arrives at a false conclusion.

The learned Circuit Court of Appeals in considering the jurisdiction of the court as to the counterclaim falls into several errors.

The Court holds that the fact set out in the plaintiff's bill does not state facts sufficient to bring it within the jurisdiction of the court, because it does not involve a question of Interstate commerce. Then proceeds further and says:

> "Where, as here, the bill and the counterclaim relate to the same subject matter, it is quite immaterial that in the case of a cross bill, and the same principle applies to a counterclaim, the parties thereto are citizens of the same State, and no diversity of citizenship exists. The cross bill and the original suit are but one cause and jurisdiction of the latter includes the former. If the court has jurisdiction of the original bill, it has jurisdiction of the cross bill without reference to the citizenship of the parties, and the cross bill need not disclose grounds of Federal jurisdiction."

Here the Court also overlooks the fact that it is not the subject matter of the suit which gives jurisdiction of a counterclaim under the First Section of Rule 30, but it is a counterclaim arising out of some *transaction* which itself must be the subject matter of the suit. The Court overlooks the fact, too, that the same facts stated in plaintiff's bill are insufficient to give the court jurisdiction and dismisses the bill, but upon the same statement of facts involving a question of purloining the quotations, the Court holds that it has jurisdiction for the purposes of the counterclaim and maintains the right of action on behalf of the counterclaim, while dismissing the bill itself for want of jurisdiction. If the subject matter of the suit is not within the jurisdiction of the court, certainly the same subject matter covered by a counterclaim could not be within the jurisdiction of the court. Otherwise, all suits could be brought in the Federal court by merely presenting the same matters in a counterclaim and allowing the bill to be dismissed.

The Court further says:

> "The counterclaim sets up a cause of action within the jurisdiction of the District Court as a Court of Equity and within its jurisdiction as a Federal court. On dismissal of the complainant's bill, the counterclaim in this suit is entitled to be treated as an original bill within the rule laid down by this court in *Vidal vs. South American Securities Co.*, 276 Fed. 855, and the authorities there cited. It has been frequently said to be the general rule that the dismissal of the original bill carries with it the cross bill, * * * but it is generally recognized that the dismissal of the original bill does not necessarily carry with it the cross bill. Whether it has that effect depends upon whether the cross bill is defensive or sets up new facts and prays for affirmative relief against the plaintiff in the original bill and shows ground for equitable relief which may uphold the jurisdiction of the court independent of the original bill."

Here the Court recognizes that the cross bill or counterclaim must show jurisdiction independent of the original bill. The counterclaim in the case at bar does not show diversity of citizenship, and the suit for an injunction merely to enjoin parties from stealing property in the City of New York is not one arising under the constitution or laws of the United States, and hence standing as an independent suit does not show jurisdiction and therefore should have been dismissed.

Wherefore the appellant shows that the Circuit Court of Appeals erred in directing the dismissal of the appellant's bill and such decree should be reversed, and that the said Court erred in sustain-

ing the jurisdiction as to the counterclaim, and affirming the order for an injunction against the appellant, and that such decree should be reversed with directions to dismiss the counterclaim; and appellant will ever pray.

JOHN M. COLEMAN,
Solicitor for Appellant
Frank Moore, President
Odd Lot Cotton Exchange.

OSCAR B. BERGSTROM,
Of Counsel.

(2594)

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Supreme Court of the United States

October Term, 1926.

No. 200.

FRANK MOORE, President of Odd Lot Cotton Exchange of New York,

Appellant,

—vs.—

THE NEW YORK COTTON EXCHANGE, THE WESTERN UNION TELEGRAPH CO. and THE GOLD & STOCK TELEGRAPH CO.,

Appellees.

APPELLANT'S REPLY BRIEF.

JOHN M. COLEMAN,
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Supreme Court of the United States

FRANK MOORE, President of Odd Lot Cotton Exchange of New York, Appellant, —vs.— THE NEW YORK COTTON EXCHANGE, THE WESTERN UNION TELEGRAPH CO. and THE GOLD & STOCK TELEGRAPH CO., Appellees.	No. 200. October Term, 1926.

APPELLANT'S REPLY BRIEF.

In the prolegomena of respondent's brief they undertake, among other things, on page 8, to give a history of the contract between the New York Cotton Exchange and the Western Union Telegraph Company in issue in this cause. In its narration of the history of the contract appear the fatuous claims that the purpose of the contract was entirely altruistic, and that its object was to accomplish the high moral purpose of destroying bucket shops. Considering the business in which cotton speculators are engaged this claim of altruism is, to say the least, amusing. We think it is fairly deducible from the history of exchanges, and their quotations, that the purpose of the contract was one purely of dollars and cents on the part of the Cotton Exchange, and in pursuance of

that purpose to establish a monopoly in the trade and transportation of cotton, and as we shall undertake to show, that such monopoly was completely established and carried out under the contract, in spite of, and to the financial loss of the Western Union Telegraph Company. For the purpose of our deductions we assume the facts as stated by Appellant, to be largely true but our deductions bring us to the opposite conclusion. It will be noted that while the bucket shop issue is not before this court on this appeal, it is made the woof running through the entire warp of the Appellee's brief, and as that issue looms large under every point made by the Appellees we feel that it deserves some consideration in this reply.

As stated by the Appellee, "prior to July 14, 1903, the Exchange permitted the Western Union Telegraph Company, and the Postal Telegraph Company, to collect quotations through its own employees on the floor of the Exchange and to distribute them to their customers without any restriction. The Telegraph Companies then sold the quotations to all persons desiring them for any purpose. The result was that many persons used them in conducting bucket shops. As a result the bucket shop evil assumed such large proportions that it brought discredit upon the New York Cotton Exchange and its members in the minds of many who ignorantly supposed, from the use of the Exchange's quotations as a basis of the illegal bets in the bucket shops, that the latter were in some way chargeable to the Exchange. To remedy this evil, on July 14, 1903, the Exchange withdrew its license to the Telegraph Companies to collect its quotations and distribute them indiscriminately, and adopted certain regulations to prevent the distribution of its quotations to persons conduct-

ing bucket shops. To accomplish this, the Exchange on July 14, 1903, entered into written contracts with the Western Union Telegraph Company, and Postal Telegraph Company, which, with slight modifications, are now practically the same as the contract dated April 4, 1922, which is printed as "Exhibit A" annexed to the Exchange's answer on pages 23-36 of the Record."

It will be noted that prior to July 14, 1903, the Western Union Telegraph Company was permitted to gather the quotations made on the floor of the Exchange, without charge, and to sell them to its customers; that on July 14, 1903, their right to gather the quotations free of charge, was discontinued and from said date they were compelled to pay for such quotations an annual sum of $13,800.00, payable monthly, and this annual payment was again increased in 1922 to the sum of $27,500.00 per annum, payable in monthly installments. No doubt, the Western Union Telegraph Company found this to be rather cold-blooded altruism, but they were in a situation where they were compelled to yield to the demand of the Cotton Exchange or discontinue that business. In addition to this fact it is apparent that the New York Cotton Exchange originally organized for the purpose of providing local merchants with some centralized trading place, and that at the time of such establishment the merchants had not in mind the idea that it would eventuate in the establishment of prices and quotations which would in effect control the cotton trade of the country, and considered their price quotations merely of local importance. The Western Union Telegraph Company recognized the value of these quotations to the buyers and sellers of cotton generally and therefore gathered

such quotations and sold them, the revenue from such sales continued to grow until they aroused the cupidity of the Exchange's officials, and the distributions of such quotations by the Western Union Telegraph Company had grown to such proportions that offices for trading in cotton were established and operated in the neighborhood of the New York Cotton Exchange, as well as in distant cities, and these traders competed with members of the Cotton Exchange on equal terms by reason only of having the use of the Cotton Exchange quotations.

Under these circumstances, with our knowledge of human nature, though limited, instead of attributing to the New York Cotton Exchange the purpose of destroying the bucket shops, it is fair to assume that it had in view a more selfish purpose, and particularly in view of the fact that the selfish purpose has been accomplished and carried out with a ruthless hand. The fair inference is, that the New York Cotton Exchange having discovered that these quotations had been made valuable by the exploitation of them by the Western Union Telegraph Company, determined to require the Telegraph Company to pay to the Cotton Exchange a part of the revenue realized by it, and as the business increased and revenues increased the Cotton Exchange increased the annual payments required to be made by the Telegraph Company. We think it also fairly inferable that the discredit of their quotations by reason of their use by bucket shops was not so much the inducing motive in making the contract of 1903 as it was to rid the members of the Exchange of the competitive traders who were able to compete with the members of the New York Cotton Exchange only by reason of the service and use of the Cot-

ton quotations as furnished by the Western Union Telegraph Company, with their subsidiary ticker service. This, we think, is the true reason because an examination of the contract will show that the New York Cotton Exchange under the contract reserves to itself an arbitrary veto power against the re-sale of the quotations by the Telegraph Company to any and all persons, and not merely to bucket shops.

In order to exercise the arbitrary veto power it was wholly unnecessary to mention bucket shops any more than the necessity of mentioning gambling shops, or any other places where business was conducted in violation of law. It is apparent that bucket shops were mentioned as a mere subterfuge or cover for the establishment of a monopolistic protection to the members of the New York Cotton Exchange, and to such other dealers the country over as may be selected by the New York Cotton Exchange and whose business is not competitive but an aid to the members of the New York Cotton Exchange. We have in the application of the use of these quotations by the Cotton Exchange under the contract with the Western Union Telegraph Company most conclusive evidence of the latter's purpose for entering into the contract. We feel perfectly safe in making this statement, that there is no person or organization in the United States transacting a cotton business, or engaged as brokers in cotton, who do not use, and are being served with the continuous cotton quotations of the New York Cotton Exchange, and that only such persons as are designated by the New York Cotton Exchange are engaged in, or can engage in, the business of buying, selling and shipping cotton in interstate commerce in the United States, and further that

there is no individual or association engaged in the cotton business in the City of New York, except such persons as are members of the New York Cotton Exchange and have the service and use of the continuous cotton quotations of the New York Cotton Exchange, and this monopolistic feature is the result of the New York Cotton Exchange's pretense of suppressing bucket shops and have used it effectively as a code word for "competitors", and it is the "sugar-coating" of the monopolistic pill which has induced the public to swallow it for many years.

The Appellee is laying great stress upon this bucket shop issue under the realization that it is the sole defense which it can ultimately make to the Appellant's demand for the service of these quotations. Appellant has admitted from the outset, and now admits, that if its purpose in obtaining the service of the continuous quotations is for the operation of a bucket shop then its petition must be denied, but the defense is not before the court on this appeal, as this appeal is prosecuted from two separate portions of the judgment of the Circuit Court of Appeals.

The first is, from that portion of the judgment which directs the dismissal of the Appellant's bill on the ground that it fails to state facts sufficient to show that the subject matter of its bill is within the jurisdiction of the court, and the second, from the order directing a judgment in favor of Appellees enjoining the Appellants from purloining the quotations. The appeal taken from the District Court to the Court of Appeals was from the order denying the Appellant's motion for a preliminary injunction, and from an order granting the Appellee's motion for a preliminary injunction. For the purpose of considering the Appellant's right

to a preliminary injunction, and in the exercise of the court's discretion, it was its duty to take under consideration both the bill and the answer, and on the appeal from the order refusing the writ on the ground of the court's abuse of discretion, it was necessary to bring before the Appellate Court both the bill and answer. On the consideration of the appeal by the Court of Appeals the Court treated the motion as a demurrer to the bill, which it had the right to do under the practice, and held that the injunction was properly denied because the bill failed to state facts sufficient to constitute a cause of action. In treating this motion as a demurrer the Court could look to the bill alone and was bound to accept as true all facts which were well pleaded, but could not and should not have taken into consideration any defense pleaded in the answer. The Court had the right to take into consideration the answer in passing upon the question of the Court's discretion in granting or refusing the preliminary injunction, but could not take into consideration any facts stated in the answer in considering the sufficiency of the bill. The bill does not set out any facts touching upon plaintiff's business as a bucket shop, but specifically charges that it is conducting a legitimate business of a cotton exchange, as is being conducted by the Appellee. This appeal is prosecuted from the Court's order directing a dismissal of the bill on the ground of its failure to state facts sufficient to constitute a cause of action and Federal jurisdiction. Hence, the issue of the bucket shop, on this appeal, is not before this court. The issue is merely brought into the case as a defense by the Appellees and that only "upon information and belief," and is not supported by any affidavit or allegation of fact showing the information upon

which such belief is based. The appellant denies such defense and expects on the trial to make clear and full proof that it is not now, has never been, and never expects to engage in the bucket shop business. Thus the issue as to whether appellant desires the use of the quotations in the conduct of a bucket shop business is a controverted fact upon which Appellant is entitled to a trial and the Court cannot determine this issue on a motion in the nature of a demurrer to the bill. Hence, Appellant shows, that there is no substance in the Appellee's claim that the contract between itself and the Western Union Telegraph Company was entered into solely for the high and moral purpose of preventing the operation of bucket shops, and further shows that almost the entire brief of Appellee is based upon the bucket shop issue, which is not now before this Court.

With this preliminary Appellant will endeavor to reply seriatim to the various points made in Appellee's brief.

APPELLEES' POINT 1.

THIS SUIT IS NOT SUSTAINABLE UNDER THE FEDERAL ANTI-TRUST LAWS.

Under this point the Appellee quotes Sections 1 and 2 of the Sherman Anti-trust Law and makes this statement in its brief, page 11: "The amended bill alleges no act or conduct by any of the defendants other than the execution of and compliance with the contract respecting the quotations of the Cotton Exchange, that has any semblance to a contract in restraint of trade, or to the monopoly of, or attempt to monopolize, any part of inter-state commerce, thus, as respects the Federal Statutes, the sole question here is, whether

this contract can be construed as one in restraint of interstate commerce or an attempt to monopolize any part of that commerce." The Appellee in this statement fails to recognize the fact that appellant's allegations bring the case within both Sections of the Sherman Anti-trust Act. First, it states the appropriate facts and charges the New York Cotton Exchange and the Western Union Telegraph Company, and its subsidiary, have entered into a contract under the terms of which it seeks to restrain trade in the cotton industry, as prohibited by Section 1 of the Act, and second, that the New York Cotton Exchange, by the development and use of its quotations, has established a monopoly of the cotton business, as prohibited by Section 2 of the Act. Proceeding with its argument under the point thus made appellee discusses the application of the "rule of reason", or the pragmatic legal philosophy, to the construction of the Sherman Anti-trust Law and cites the authorities on that subject with which we are all familiar, and which no one now questions.

In this connection the Appellees strongly press upon this Court a consideration of the *intention* of the parties to the contract as a governing element in its construction. We have endeavored to show hereinbefore that we do not concur with the Appellees as to their *intent* in entering into this contract, and we have endeavored further to show that their actions in establishing and maintaining a monopoly of the cotton business does not square with their protestations as to their *intent* in entering into the contract. From this it will be observed that there is a controversy of fact as to such *intentions* upon which we are entitled to a trial, and which the Court cannot rightly deny us by deciding that fact on a mere motion in the

nature of a demurrer to our bill. Then proceeding to page 16 of the brief the Appellee proceeds to discuss the allegations of the answer as to the use of quotations by bucket shops, and the intent of the Appellees in entering into the contract. This matter we have discussed and shown as we believe that this question is not now before the Court. However, in discussing the contract on page 18 of Appellee's brief, the Appellees say: "This contract does not undertake to fix the prices which the Telegraph Company must exact from those desiring the continuous or other quotations. It does fix the maximum price to be charged members of the Exchange, but does not prescribe minimum prices to anybody. The contract is, therefore, not to be condemned as within the principle established by the Supreme Court, in the cases cited." The Appellees here cite the price fixing cases, on page 19 of their brief. Referring to the cited cases Appellee further states, "which prohibit agreements made by patentees, or others, with their purchasers under which the latter agreed to resell at the prices fixed by the former. These cases are reviewed in *Boston Store vs. American Graphophone Co.*, 246 U. S. 8. The contracts condemned are those which aim to establish a price maintenance system and a permanent marketing price. The contract in the case at bar has no such purpose. Applying to it 'The rule of reason,' neither the nature, nor the character of the contract, nor the circumstances surrounding it, justify the conclusion that it is entered into for the purpose of restraining trade or of creating a monopoly, or for any purpose other than that of properly and fairly regulating the transaction of the business for which the New York Cotton Exchange was organized and of preventing the

misuse of its quotations. It is but a normal method of accomplishing a highly beneficial purpose—the prevention of the use of quotations in bucket shops. As such the contract is not within Section 1 of the Sherman Act as construed by the decisions of the Supreme Court already cited." The Appellee here fails to grasp the principle upon which the cases are decided, and narrows the principle to the facts in the cases which establish the principle. The Sherman Anti-trust Act does not condemn price fixing on re-sale of personal property but condemns "every contract * * * in restraint of trade or commerce." It is the fact that a condition of re-sale is based upon a price fixed which causes a *restraint of trade* that brings it within the condemnation of the Sherman law. It is not the "price fixing" *proprio vigore*, but it is its effect to "restrain commerce." In reviewing the cases this Court says, in *Boston Store vs. American Graphophone, supra*, "The case therefore directly involved the general question of the power of the patentee to sell and yet, under the guise of license or otherwise, to put restrictions, which in substance, were repugnant to the rights which necessarily arose from the sale, which was made." This is the general principle laid down in all of the cases. It is not merely the fact of price fixing, but it is its effect as a restriction on the right of the purchaser to re-sell his property, which brings it within the condemnation of the Sherman Anti-trust Law. This Court discussing the same question in *United States vs. Patten*, 226 U. S. 524, says, page 541: "Section 1 of the Act, upon which the counts are founded, is not confined to voluntary restraints, as where persons engaged in interstate trade or commerce agree to suppress competition among themselves, but includes as

well involuntary restraints; as where persons not so engaged conspire to compel action by others, or to create artificial conditions, which necessarily impede or burden the due course of such trade or commerce, *or restrict the common liberty to engage therein.*"

The Anti-trust Act is sweeping, and sufficiently comprehensive in language to include in its condemnation every form of contract, or conspiracy, tending to restrain commerce, and is not limited to mere price fixing except in so far as such price fixing by contract for re-sale limits the purchaser's right of further alienation of his title, and thereby places a restraint on commerce. The contract under consideration between the New York Cotton Exchange and the Western Union Telegraph Company conveys absolute title to the quotations to the Western Union Telegraph Company but limits its right to re-sell such quotations to such persons only as may be approved by the vendor, the New York Cotton Exchange. This is such a limitation on further alienation of property actually sold, as to bring it directly within the ambit of the trust law, as defined by all of the price-fixing cases referred to and all other decisions of this Court on that subject.

Continuing its argument under this point, on page 22 of the brief, the Appellee says: "As the owner of the quotations, the Exchange is under no legal duty to sell it to any particular person nor is it under any legal obligation to sell to all because it sells to some. It has the legal right to determine to whom it will sell, and to require its Agent (The Telegraph Company) which it employs to effect sales to carry out its purpose to select its purchasers, and, in exercising this right to select those to whom it will communicate the

quotations, it does not attempt to monopolize or otherwise violate the Sherman Act or the general law." In support of this proposition Appellees cite, *Whitwell vs. Continental Tobacco Co.* 125 Fed. 454; *United States vs. Trans-Missouri Freight Association,* 166 U. S., 290, 320 (1897); *Eastern States Lumber Association vs. United States,* 234 U. S., 600, 614 (1914); *United States vs. Colgate & Co.,* 250 U. S., 300, 307, (1919). The distinction between those cases and the other price fixing cases was clearly pointed out by this Court in *United States vs. Schraders Son,* 252 U. S. 85. In the cases cited by Appellee there was no claim made under Section 2 of the Sherman Act that the parties had created, or established, a monopoly in their respective lines of business, but charged that they had entered into combinations to restrain commerce under Section 1 of the Act. It appeared from the facts that the dealers in those cases had not entered into any contract, or conspiracy, to fix resale prices, but the prices which they had submitted for re-sale were merely advisory, and admonitory, and necessarily the Court held that these dealers being engaged in a private business in the absence of a monopoly, had the right to select their customers, and to state in advance the conditions upon which it would continue to deal with such customers. Hence the proposition made by the Appellee, last referred to, and the authorities cited, have no application to the case at bar since this case is brought expressly upon a *contract,* limiting the right of the purchaser to re-sell its property and thereby restraining trade in that property. The Appellees also cite under that proposition the cases of *Bitterman vs. Louisville & Nashville R. R. Co.* 207 U. S. 205, 222 (1907); *Federal Trade Commission vs. Curtis Publication Co.,* 260 U. S. 568 (1923). These

cases have no relation to the instant case. The *Bitterman* case, *supra*, involved the question of the right of ticket scalpers to engage in the business of buying and re-selling limited Railway tickets. The Court in that case held, that while transportation contracts were property, they were a qualified property right of a personal service to the purchaser of a conditional ticket, and therefore did not come under the general provisions of the law covering the dealings in property and commodities generally. The *Curtis* case, *supra*, merely involved the question whether a dealer had the right, without violating the anti-trust laws, to employ an agent to handle his business exclusively. That was merely a question of agency and the Court held, the only logical conclusion, that every business man or trader has the right to employ agents to handle their business exclusively without violating any anti-trust or monopoly law. There is no question of agency, however, in the case at bar.

Continuing the argument under the foregoing point the Appellees say on page 24 of their brief: "But the question whether this contract is to be condemned as a restraint upon trade, or an attempt at monopoly, either under the Sherman Act, or the general law, is conclusively settled in the negative by the decision of this Court in *Board of Trade vs. Christie Co.*, 198 U. S. 236 (1905)." The only issue in the *Christie* case was as to whether the quotations of the Board of Trade were property, and whether the Courts would protect such property right against theft or other unlawful appropriations. It is true that the arguments in the case assumed a much wider scope than was nececsary to the decision of the single issue in the case, and the Court in its opinion did discuss some of the irrelevant arguments, but strictly reserved all decisions upon the points discussed except the one point that

the quotations were property, and that the Courts would protect the owner of such quotations against unlawful appropriation. The issue decided in that case effects only the Appellees cross-claim for an injunction against Appellants purloining the Appellee's quotations, but the issue in the case so decided has no bearing upon, or relation to, the issues presented by Appellant in his bill in the instant case.

We should not give that case any extended consideration except for the fact that the Appellees so earnestly stress the decision in that case, and press it upon this Court as *conclusively* settling the issues raised by plaintiff's bill. By referring to the subsequent cases, which we have cited in our brief, the *Christie* case has been limited to the facts of that case. That was scarcely necessary as this Court had itself made such limitation in the opinion on that case. In the opinion in the *Christie* case, this Court says: "The defendants lay hold of the declaration in the case last cited, (*New York & C. Grain & Stock Exchange vs. Board of Trade*, 127 Ill. 153) and say, with doubtful consistency, that this information is of sufficient importance that it is clothed with a public use, and that therefore, they are entitled to get and use it. In the case referred to it was held, that the plaintiff, which had been receiving the continuous quotations was entitled still to receive them on paying for them, and submitting to all reasonable requirements in relation to the same. Perhaps the right of the plaintiff would have been more obvious if it had demanded an opportunity on reasonable conditions of collecting the information for itself, especially if the legislature had seen fit to provide by law for its doing so. But it is not necessary to consider whether we are bound by that decision, or, if not, should follow it *since in these cases the claim is*

not qualified by the submission to reasonable rules, or any offer of payment. It is a claim of independent rights and a denial that plaintiff has any right at all." In the instant case the appellant merely contends that under all of the circumstances the Western Union Telegraph Company is bound to furnish him with the quotations upon his offer to sign the usual application and enter into the usual form of agreement and to pay the usual price for such service. Appellant does not deny the Appellees property right in the quotations, as was done in the *Christie* case, and comes strictly within the reservation made by the opinion of the Court in the *Christie* case last referred to.

Proceeding further in the opinion in the *Christie* case this Court says: "Finally it is argued that the contracts with the Telegraph Companies violate the Act of July 2, 1890. The short answer is, *that the contracts are not relied on as a cause of action.*" In the instant case on the contrary Applicant's cause of action is based specifically upon the contract between the New York Cotton Exchange and the Western Union Telegraph Company (See among others Sec. 21 of the Bill R. 5). Continuing the opinion in the *Christie* case this Court further says: "It is argued that the true purpose is to exclude all persona who do not deal through members of the Board of Trade. Whether there is anything in the law to hinder such regulations being made with that intent we will not consider, *as we do not regard such a general scheme as shown by the contract or proved.*" In the instant case appellants specifically set out the facts of the genesis of the quotations on the New York Cotton Exchange, and in Section 25 of the Bill (R 6 & 7) show fully the method of controlling the cotton trade by the Exchange, and its members, forming a complete monopoly of the business, and the effect of

monopolizing such cotton business by the New York Cotton Exchange, and its members, is fully charged in Section 29 to and including Sec. 31 of the Bill (R. 9). Thus Appellant contends, and shows that none of the issues made in this case by the Appellant's bill are involved in the *Christie* case, and while the argument in that case took a wide range, and did cover some of the issues, this Court was careful to call attention to the fact that none of those issues were in fact involved and therefore reserved its opinion upon such issues.

Proceeding further with the argument under its First Point, the Appellee says, on page 25 of its brief, "The contract here thus being neither an attempt at monopoly nor a contract in restraint of trade, it remains to consider whether on any other principle of law, the plaintiff is entitled to the quotations belonging to the Appellee. If, so, it must be either: (1) Because the quotations have become legally impressed with a 'Public use' to that extent that, if distributed at all, they must be distributed without discrimination, except to bucket shops." Following this proposition Appellee argues that merely because a business has grown large, and became influential, it did not become impressed with a public use, as a public utility, or a public service corporation.

And Appellee cites authorities on the proposition that it was a matter for the legislative Department to determine when a private business has become of sufficient importance to effect the public interests, and should therefore be submitted to regulations, but that the judiciary could not undertake such regulations without legislative authority. this proposition we do not challenge, nor do we contend that the appellant is entitled to the quotations because business of the Cotton Exchange has grown large, and influential, in the cotton business. We

confine our claim strictly to the legislative enactment under the Sherman Act of, 1st, prohibiting contracts, combinations, and conspiracies, in restraint of trade, and 2nd, prohibiting monopolies in trade. So we deem it unnecessary to discuss Appellee's authorities under this proposition.

Under this proposition the Appellee also discusses the *Express* cases and the cases following presenting the same issue. These cases have no bearing upon the issues in the instant case. The Appellee takes the position that a public service corporation may engage in certain activities, which are not a part of its charter obligations, and hence, the Western Union Telegraph Company when engaged in the sale and distribution of stock quotations did not become liable therein as a part of its charter business. The fallacy of this position lies in the premiss. In the *Express* and *Cab* cases the Railway Companies did not engage in the express or cab business, but merely employed them as *agencies* in conducting the business of the transportation of freight and passengers under their charters. This Court held, that so long as the travelling public made no complaint of this service the Railway had the right to select its own agencies for carrying out its charter obligations. This is to say, that instead of itself carrying express matter it could employ an agent or an Express Company to do it for them, and that they were not bound to employ everybody who sought such agency. Just as the Company had the right to purchase its cars from any manufacturer it saw fit and was not bound to buy cars from all manufacturers who offered them. These principles do not apply to the instant case, because the transmission and sale of quotations is not merely an instrumentality or an agency employed by it for the purpose of conducting its charter business of transmitting messages for pay, but in

this case it is an extension of its ordinary business under the charter to additional business, which is also contemplated by its charter, and becomes one of its charter obligations to serve all persons alike to the extent of its capacity. Being a public service corporation it cannot by the use of its wires over public streets, alleys and roads conduct a private business. If it cannot acquire the quotations in a way to serve all persons alike then they must not acquire them at all, and must not undertake to conduct a private business under its charter. A sample illustration of the rule would be to take a water company acquiring a franchise to operate a water works plant in a city and after occupying the streets of the city with its pipes and connections should purchase its water supply on condition that it would re-sell the water to such persons only as the vendor of the water would approve; that the water company would not be permitted to conduct its business under any such arrangement needs no argument, nor comment, and yet that is the position which the Appellee takes here.

Further arguing this proposition, the Appellee says on page 30 of its brief: "If the Exchange is the distributor of the quotations through the agency of the Telegraph Company, a negative answer would seem to be unavoidable; for any other rule would make the news of Associations like the Associated Press and even private messages, open to all, which is at variance with the decisions." On this proposition Appellee cites the *Associated Press* cases, which have no resemblance to the case at bar. They are in no sense cognate cases. They do not deal with a commodity transmitted by interstate commerce nor are they in any respect instrumentalities of interstate commerce.

Appellee then further proceeds on this proposition, as follows: "It is argued that by its con-

tract with the Exchange the Telegraph Company acquired by purchase an *unlimited* ownership in the quotations, and that being thus possessed in its public capacity the rule that common carriers must serve all alike applies to the distribution of quotations. This position is erroneous because the Telegraph Company under this contract acquires, if any interest only a restricted one—a right to sell to certain designated persons; and when it has done this its entire interest in the quotations is gone." The fallacy of this proposition again lies in the premiss. The Appellee here assumes that the Telegraph Company acquires only a *restricted interest or title* to the quotations. When we refer to the plaintiff's bill we find the facts stated, in Paragraph 23 (R. 5), that the Western Union Telegraph Company and the New York Cotton Exchange have entered into a contract whereby the New York Cotton Exchange gives to the Western Union Telegraph Company, and the Gold & Stock Telegraph Company, the whole and exclusive right to disseminate the continuous cotton market quotations, and by referring to the contract itself it will be found, in Sec. 5 thereof (R. 32), that the Western Union Telegraph Company shall pay to the New York Cotton Exchange the sum of $27,500 00 per annum for the privilege of receiving and serving such continuous quotations, and it is further provided, in the 2nd Section of said contract, that the said Telegraph Company shall have the right for its own use and benefit to sell such quotations to any and all persons whose applications for the service of such quotations shall be submitted to, and approved of by, the New York Cotton Exchange. Such approval being the sole limitation upon the right of the Telegraph Company to sell such quotations for its own use and benefit, the Exchange having no interest whatsoever in

the proceeds of such sales. The Appellee takes the position that it does not acquire complete title to or ownership of these quotations, and that therefore it merely becomes an agent for the distribution of such quotations. The Appellee here falls into the same error that the Court did in the *Renville* case 46 App. Div. 37, and that the Circuit Court of Appeals fell into in its opinion dismissing Appellant's bill in this case. In the *Renville* case *supra,* the Court held, that under a contract similar to the one here complained of, the Telegraph Company merely occupied the position of an agent for the Stock Exchange. The Court in that case significantly remarked, however, that if the Telegraph Company had acquired the ownership of the quotations a different question would have been presented. The fact is, that the Telegraph Company did acquire full and complete title to these quotations subject only to the veto power of the New York Cotton Exchange, its vendor, of resale to any persons except such as had been previously approved by the Exchange. If the Contract had merely provided, against a resale to bucket shops or to persons intending to make unlawful use of such quotations, no criticism could have been made of the contract but the question of re-sale to bucket shops, as we have heretofore pointed out, was a mere subterfuge. The contract goes further and provides in terms that all persons desiring the service of these quotations must make application in writing to the Telegraph Company, and the Telegraph Company must submit such application to the Cotton Exchange, and that such application should not become effective until it had been approved by the Cotton Exchange. It does not make a rejection conditional upon finding the proposed applicant objectionable for any reason, but the Cotton Exchange had the right under the contract to

exercise its rejection capriciously, or whimsically, and if after an application had been approved, and the quotations being served, the Cotton Exchange had the right arbitrarily to order such service discontinued. This reservation in nowise affected the title to the quotations, because the Exchange had reserved no right in the quotations themselves. That is to say, no right to resell, and no interest of any kind in the proceeds of the resale. Thus the condition *did not restrict the title but was a mere restraint upon their further alienation*, and in all of the cases, which this Court has had before it, in price fixing and otherwise this Court has summed up the issue in short, terse language, in *Straus vs. Victor Talking Machine*, as follows: "Courts would be perversely blind if they failed to look through such an attempt as this license notice, this plainly is to sell property for a full price, and yet to place restraints upon its further alienation, such as have been hateful to the law from Lord Cokes day to ours, because obnoxious to the public interest." This summing up appears to Appellant so clear, simple and conclusive that it needs no further argument. Appellee under this same point makes the contention that it is not engaging in the sale of these quotations in its capacity as a public service corporation, but as a private activity, as they would be buying and selling news. We are not prepared to go as far as the Appellee does on this question that it may use its public instrumentalities of wires and poles on the public streets and alleys and highways to conduct a private business in the purchase, transmission and sale of news. However, that question does not enter here, as conducting a ticker service for the sale of quotations, which control and effect interstate commerce, and therefore instrumentalities of interstate commerce, comes strictly within the charter business and obligations

of a Telegraph Company. On this proposition we have cited the authorities in our original brief on page 63 to 65, and do not deem it necessary to repeat them here.

APPELLEES' POINT 2.

THE TRANSACTIONS ON WHICH THE AMENDED BILL IS BASED DO NOT INVOLVE INTERSTATE COMMERCE.

Under this point the Appellee makes the following propositions.

"(a) Such contracts are made in the board room of the Exchange and provide that the cotton is deliverable from licensed warehouses in the port of New York. Performance of the contract in the month when the cotton is deliverable must be made by the delivery of negotiable warehouse receipts issued by licensed warehouses in the port of New York. There is no obligation to make delivery at any place except in that port." This is so obviously begging the question that it scarcely needs any comment. The bill in this suit is not based on any transaction or any number of transactions conducted on the floor of the New York Cotton Exchange. What the bill does contend is, that by reason of the transactions conducted on the floor of the New York Cotton Exchange a new property is created. That is to say, a price quotation. These price quotations are the result of a large number of factors which through information have been gathered in the United States and Europe and centered in the Cotton Exchange. The bill alleges that this concentrated product, the quotation, immediately becomes an instrumentality of interstate commerce with the inherent potentiality of initiating all purchases

and sales of cotton in interstate transactions, and to initiate the interstate transportation of cotton in pursuance to such purchases and sales. This issue goes far beyond the limited question discussed by appellee as to the local transactions and are discussed by this Court in the authorities cited by the Appellee on pages 34 to 37 in its brief. We recognize the rule that a contract entered into in a State and to be completed within that State does not constitute interstate commerce, nor so affect interstate commerce as to vest in the Federal Courts jurisdiction over controversies involving such contracts, but we have here an entirely different question. Section 25 of the bill, among others, (R., 6 & 7), charges that these quotations, by long established custom, completely control the purchase, sale and transportation of cotton in interstate commerce. That no person can engage in such business without being licensed by the New York Cotton Exchange, through the service of these quotations; that these quotations are an instrumentality of interstate commerce which completely dominates the cotton business; that it is through the service of or refusal to serve such quotations that the New York Cotton Exchange has established its complete monopoly of the business; that by the use of these quotations it completely monopolizes the business in New York City by limiting the service of the quotations to its own members, and refusing the service thereof to any individuals in the various parts of the United States where cotton is dealt in, and that it restricts such licensed quotations to the particular individuals selected by them, and refuses the quotations to all other persons, so that no one can engage in the cotton business in any part of the United States unless he be so licensed by the Exchange's quotations; that by the use of such quo-

tations the Cotton Exchange has a complete monopoly and controls, and dominates, the cotton business; that by refusing the quotations to others than their special licensees, they have destroyed all competition and restrain the free flow of cotton in interstate commerce. The bill also states that the Appellant has undertaken to carry on the business of dealing in cotton in interstate commerce, and has applied to the Western Union Telegraph Company for the service of the quotations offering to comply with all the conditions imposed on such applicants and to pay the usual price therefor, but that such application was refused on the ground that the New York Cotton Exchange had refused to approve the application and that therefore the Appellant is deprived of transacting a cotton business in interstate commerce. That for the purpose of conducting such business these quotations and the Western Union Telegraph lines are absolutely necessary, and the Appellee the New York Cotton Exchange admits that the Appellant cannot conduct such business without the service of these quotations (R., 15, paragraph Eight of Appellees' answer), and that it, upon the refusal of the Cotton Exchange, has declined to serve such quotations, and hence, that no person can conduct such business except it obtains the license of the New York Cotton Exchange by use of its quotations. It seems puerile to argue that these quotations are matters of local import, and do not directly affect interstate commerce. They are not a commodity which is contracted for, with the hope of being shipped in interstate commerce, but are the very instrumentality by which interstate commerce is to be originated, and conducted, and therefore may be said to be interstate commerce itself.

APPELLEES' POINT 3.

THE CIRCUIT COURT OF APPEALS HAD JURISDICTION TO ENTERTAIN APPELLEES' COUNTERCLAIM AND TO GRANT A FINAL INJUNCTION THEREON.

Under this point the Appellees assert that both the amended bill and the counterclaim relate to the same subject matter. The Appellees do not contend that its counterclaim comes within the 2nd subdivision of equity rule 30, that a defendant may counterclaim any cause of action, which would be the subject matter of an independent suit in equity. Being limited in its counterclaim to the subject matter of the suit, the question arises what is the subject matter of the suit as set out in the bill? This question we have fully discussed in our original brief beginning at page 68, but as Appellee stresses its position of jurisdiction, and discusses the fundamental equity jurisdiction, we will again call attention to Equity Rule 30, which provides: "The answer must state, in short and simple form, any counterclaim arising out of the transaction, which is the subject matter of the suit, * * *." It will be noted that the counterclaim must arise out of a *transaction,* and not merely a tort. It must be evident that one tort cannot be offset, or counterclaim, against another tort. Appellant's bill charges that the Appellee is guilty of a tort in its failure and refusal to serve Appellant with the continuous quotations of the New York Cotton Exchange under the Sherman Anti-trust Law. The Appellee joins issue with Appellant on the allegations of the bill, and then presents a specific counterclaim against the Appellant on the ground that the Appellant is guilty of a tort, because of its purloining Appel-

lees' quotations without right and without consent of the Appellees. Neither of these claims arise out of a *transaction*. These claims are not cognate, and the grant of one in nowise affects or precludes the grant of the other. The appellant may be granted the relief by injunction against the appellees' refusal to furnish the quotations to appellant under proper conditions of compensation, etc., and at the same time without conflict may grant the Appellees an injunction against apellants purloining such quotations, or, without any conflict whatever, may grant the injunction to one and refuse the other. The two causes of action are wholly unrelated and do not cover the same transaction, except in so far that both suits relate to "torts," and it must be kept in mind that the quotations are not the subject matter of the suit, but that the subject matter of the suits of both Appellant and Appellee are the torts for which the suits are brought.

APPELLEES' POINT 4.

REPLYING TO ARGUMENTS IN APPELLANT'S BRIEF.

Under this point the Appellees make a number of propositions which deserve some consideration. The first is, that "the Circuit Court of Appeals had the right to regard the whole record before it in finally disposing of this case." "Appellant argues at page 40 of his brief, that in arriving at its decision to dismiss the amended bill the Circuit Court of Appeals erred in considering any facts alleged in the answer, that it should have considered only the allegations of the amended bill. No such error was specifically assigned by appellant and this question is, therefore, not properly before

this Court." Under this proposition the Appellee argues "that the Circuit Court of Appeals had before it the whole record consisting of the amended bill of complaint, the answers, the reply and certain affidavits. It was called upon to determine two questions: 1st, Was Appellant entitled to a preliminary mandatory injunction directing Appellees to furnish him with the continuous quotations? 2nd, Was Appellee, the New York Cotton Exchange, entitled to an injunction prohibiting Appellant from receiving or using the same quotations? If it determined the latter question in favor of Appellees, it must necessarily have passed upon the first question adversely to appellant, because it could not have decided that appellant should be enjoined from receiving the quotations except on the theory that he was not entitled to them. In determining Appellee's right to an injunction the Circuit Court of Appeals had the right to examine the allegations of the answer and the supporting affidavits and had to determine on these whether appellant was entitled to receive the quotations. It seems anomalous to argue that the Court could look to the answer in determining one motion for an injunction which necessarily decided the other motion and yet could not consider the same papers in denying Appellant's motion and dismissing the bill. The record does not present the simple case of a motion to dismiss on Appellant's amended bill of complaint alone, but one in all its essential features like a case submitted on bill and answer where all the pleadings are before the Court for its final disposition of the issues. If the Circuit Court of Appeals treated the case as one submitted on bill, answer and reply and Appellant seeks to reverse its decision on the theory that it should not have so treated it,

then he should have assigned this method of dealing with the case as error. But the record contains no such assignment of error."

This proposition for consideration must be subdivided into two classes: 1st, the proposition that no error was assigned to the action of the Court in considering the answer on the dismissal of the bill; and 2nd, the treatment of the case in the Circuit Court of Appeals as upon bill and answer. By referring to the errors assigned it will be found that Appellant assigns as the first error complained of, the following: "The Court erred in holding that the facts stated in the amended bill of complaint failed to show that the subject matter of the suit affects or involves interstate commerce or present any Federal question under the Federal Anti-trust laws or otherwise sufficient to give the trial Court jurisdiction of the suit, and for that reason dismissing complainant's amended bill." This assignment of error is certainly broad enough to present the question specifically complained of. It was not necessary and in fact would have been highly improper to embody in the assignment itself an argument of the reasons why the Court so erred, and a statement of the process of ratiocination by which the Court reached the erroneous conclusion complained of. Those are all matters proper for propositions and arguments under the assignment of error itself, but not proper for inclusion in the assignment of error.

The second proposition or rather subdivision of Appellee's point is, that on the motion for a preliminary injunction, both the trial and the appellate court, had a right to consider both the bill and answer on both questions of discretion to grant or refuse the injunction, and in their treatment of the motion as a demurrer to the sufficiency

of the bill itself. Following out the Appellee's proposition to its logical conclusion the result would be, that the plaintiff filed his bill for relief praying for an injunction against the defendant, and upon such bill made a motion for a temporary injunction. The defendant replies to the bill denying plaintiff's allegation of fact and all equities of the bill. Upon this motion for injunction the Court has the right to search the plaintiff's bill to ascertain whether plaintiff has stated any cause of action at all. On that investigation the Court cannot take into consideration any facts set up in the answer but must look to the facts stated in the bill alone and must assume conclusively that all facts well pleaded in the bill are true, and if the Court concludes that the facts so pleaded are not sufficient to constitute a cause of action the Court then, without proceeding further, and without in anywise taking into consideration the answer, must dismiss the bill and thus deny the motion for the injunction. If the Court, however, finds the bill sufficient, to constitute a cause of action then for the first time the Court may look to the answer to ascertain whether the answer denies the equities of the bill, and if so, whether the Court in its discretion should grant or refuse the motion of the plaintiff for a preliminary writ of injunction. This, as we understand, is the thoroughly established practice. If, on the other hand, the Court on a motion for a preliminary injunction, in considering the sufficiency of the bill to constitute a cause of action (should be permitted), to examine the facts stated in the answer as on a submission on bill and answer, and assume the facts stated in the answer to be true, and decided the issue of fact in favor of the defendant, and thereupon dismiss the bill, plaintiff

would be deprived of the right of trial on the controverted issues, and have a final decree rendered against him, on the mere assumption of the truth of the facts stated in defendant's answer. In the instant case, the fallacy and injustice of such a rule is demonstrated by the fact, that the plaintiff seeks to compel the defendant to serve the plaintiff with its continuous cotton quotations. The defendant answers by charging that the plaintiff is not entitled to the quotations because it is engaged in the unlawful occupation of a bucket shop business. Plaintiff admits the legal conclusion that if it is engaged in the bucket shop business and desires to use such quotations in the conduct of that business then it is not entitled to the service of such quotations, but he denies the fact that he is, or intends to, engage in such occupation; thus creating an issue of fact on the motion for the preliminary injunction, the Court, without affording the plaintiff any trial or opportunity to be heard, decides that issue of fact in favor of the defendant and dismisses the bill. It is true that if plaintiff had submitted the case on bill and answer, plaintiff would thereby have waived all right of trial, and admitted the truth of all facts well pleaded by the defendant, and the Court upon such admission could then have decided the case on its merits, and dismissed the bill, but no such proceeding was even intimated by the plaintiff in this case, and the only procedure taken was the submission of a motion for a preliminary injunction, and if on that motion alone the Circuit Court of Appeals decided that the facts stated in the answer constituted a good defense to the plaintiff's bill, and therefore the bill should be dismissed, this of course, was erroneous, and deprived appellant of his right to a

hearing and a trial of the controverted facts presented by the bill and answer.

The appellee makes the further argument under this point, that the granting of defendant's injunction was necessarily a denial of the plaintiff's injunction, and was conclusive of the case. We have heretofore undertaken to show that the two applications for injunctions by the Appellant and Appellee respectively did not refer to the same subject matter, were wholly unrelated and not conflicting, and therefore the granting or refusal of the one injunction could have no effect upon the granting or refusal of the other injunction. Under this proposition the Appellee further argues that it was the intention of the parties to treat this case as a submission on bill and answer, because after the order of the Circuit Court of Appeals dismissing the plaintiff's bill, and for the purpose of obtaining a final order on the counterclaim so that the whole case might be appealed at once, the appellant consented that the Court of Appeals might consider the defendant's affidavits on the counterclaim and make such order as the Court of Appeals might deem proper in its opinion. The appellee, with doubtful candor, contends that this was intended as a submission of the case on bill and answer. This is certainly a most far fetched conclusion and without any possible justification.

The decision of the Circuit Court of Appeals had already been rendered on December 21, 1923, when the stipulation was entered into (R., 69), and upon this stipulation the final order was entered on January 9, 1924 (R., 70). After the Circuit Court of Appeals had rendered its decision ordering a dismissal of the complaint, and affirming the decision of the lower Court granting Appellees an injunction against Appellant, the de-

cision was final as to plaintiff's case, but left the counterclaim for injunction yet to be tried on the facts, which might later involve a separate appeal, and as the counterclaim involves the question of jurisdiction the respective solicitors for Appellant and Appellee entered into the stipulation solely as to the counterclaim as stated (R., 70) in order that this appeal might cover both actions. How eminent counsel for Appellee should even seek to warp this stipulation into meaning other than what it says is quite beyond our understanding.

Our brief on page 40 states that the "bill was directed to be dismissed * * * on motion for preliminary injunction and therefore must be treated as if it had been stricken out on motion for want of equity or failure to state facts sufficient to show that a question of Interstate Commerce was involved, and for the purpose of considering the sufficiency of the bill, all of its allegations must be taken to be true without regard to any defensive matter set up in the answer." Then our brief on same page complains that the learned Circuit Court of Appeals considered the answer in passing upon the sufficiency of Appellant's bill.

The remaining propositions under this point we have already fully discussed and do not deem it necessary to give them any further consideration.

WHEREFORE the appellant again prays that the order of the Circuit Court of Appeals directing the dismissal of plaintiff's bill be reversed, and that the order granting the Appellee's injunction be reversed with directions to dismiss the Appellee's counterclaim.

JOHN M. COLEMAN,
Solicitor for Appellant
Frank Moore, President,
Odd Lot Cotton Exchange.

OSCAR B. BERGSTROM,
Of Counsel.

FEB 27 1925
CLERK

No. for October Term, 1925

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Supreme Court of the United States

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FRANK MOORE, President of the ODD-LOT COTTON EXCHANGE OF NEW YORK,

Complainant,

against

NEW YORK COTTON EXCHANGE, THE WESTERN UNION TELEGRAPH COMPANY and THE GOLD AND STOCK TELEGRAPH COMPANY,

Defendants.

PAPERS IN OPPOSITION TO MOTION FOR STAY OF INJUNCTION PENDING APPEAL.

HENRY W. TAFT,
Counsel for Appellee,
New York Cotton Exchange,
40 Wall Street,
New York City.

PRINTED IN U. S. A. BY INGLE, INC., 206 FULTON STREET, NEW YORK CITY.

Supreme Court of the United States

FRANK MOORE, President of the Odd-Lot Cotton Exchange of New York,
Complainant,
against
NEW YORK COTTON EXCHANGE, THE WESTERN UNION TELEGRAPH COMPANY and the GOLD AND STOCK TELEGRAPH COMPANY,
Defendants.

Affidavit in Opposition to Motion for Stay.

STATE OF NEW YORK, }
COUNTY OF NEW YORK. } ss.:

FRANCIS DEAN, being duly sworn, deposes and says:

I am an attorney and counsellor at law in the office of Cadwalader, Wickersham & Taft, solicitors for the defendant-appellee, New York Cotton Exchange, and am familiar with all of the proceedings heretofore had in this suit.

This is a motion by the complainant-appellant for (1) an order to withhold the mandate of the Circuit Court of Appeals for the Second Circuit on the affirmance of a decree of the United States District Court for the Southern District of New York and to suspend the enforcement of the injunction therein granted against the appellant; and (2) an order to advance the hearing of the cause in accordance with Rule 32 of this Court.

The defendants-appellees do not oppose an order advancing the hearing of the appeal herein. Complainant brought this suit for an injunction requiring the defendants-appellees to furnish him and the Odd-Lot Cotton Exchange with the continuous quotations of the prices

of cotton of the defendant-appellee, the New York Cotton Exchange. The defendants, in their answer to the amended bill of complaint, asked for an injunction restraining the complainant from purloining and receiving the quotations of the defendant, the New York Cotton Exchange.

The United States District Court for the Southern District of New York, Judge Learned Hand presiding, granted an interlocutory injunction in favor of the defendants-appellees and against the complainant-appellant on March 26, 1923, and denied complainant-appellant's motion for a preliminary injunction. Judge Hand allowed complainant-appellant's petition for appeal on April 16, 1923 and provided that the order granting an injunction to the defendants be stayed upon appellant giving a bond in the sum of Five thousand Dollars ($5,000.), "said stay to continue until said appeal is heard and determined".

A copy of the order marked "Exhibit A", is annexed hereto and made a part of this opposing affidavit, and a copy of the opinion of Judge Hand, marked "Exhibit B", is hereto annexed and made a part of this affidavit.

Complainant-appellant prosecuted his appeal in the Circuit Court of Appeals for the Second Circuit. The said Circuit Court of Appeals made an order on December 21, 1923 affirming the order of the District Court and directing the District Court to dismiss the complainant's amended bill.

On January 9, 1924 the Circuit Court of Appeals for the Second Circuit entered a further order on stipulation of all parties which decreed as follows:

> "That the order appealed from which denied complainant's motion and granted defendants a preliminary injunction, be and hereby is affirmed with costs.
>
> "It is further ordered that the District Court enter a final decree dismissing complainant's amended bill of complaint with costs and awarding to the defendants a final injunction to the same

effect as the preliminary injunction in the order appealed from.

"It is further ordered that a mandate issue accordingly."

A copy of the opinion of the C. C. A., marked Ex. C, is hereto annexed.

On January 23, 1924, Mr. Coleman, solicitor for the complainant-appellant appeared before Honorable Henry W. Rogers, the presiding judge of the Circuit Court of Appeals for the Second Circuit, and applied to him for a stay of the mandate of the Circuit Court of Appeals pending an appeal to this Honorable Court. Messrs. Henry W. Taft and George Coggill, members of the firm of Cadwalader, Wickersham & Taft, solicitors for the defendant-appellee, the New York Cotton Exchange, appeared before Judge Rogers in opposition to the application.

Judge Rogers granted the petition for appeal, fixed the bond for costs on appeal in the sum of One Thousand Dollars ($1,000) and denied the petition for supersedeas. Judge Rogers' memorandum granting the petition for appeal was as follows:

"Appeal allowed and bond to cover costs fixed in the sum of One thousand Dollars ($1,000), conditioned as the law directs to be executed by a surety company and approved by one of the Judges of this Court. *Petition for supersedeas is denied.*

HENRY WADE ROGERS,
U. S. Circuit Judge."

Judge Rogers informed Mr. Coleman that he might, if he pleased, make an application to a Justice of this Honorable Court for a stay of the mandate pending the termination of the appeal by this honorable court and that he would request the clerk to withhold the mandate until Mr. Coleman had an opportunity to make such application.

On February 21, 1924, Mr. Coleman and deponent appeared before Honorable Louis D. Brandeis, one of the

Justices of this court in his apartment in Washington, D. C. Mr. Coleman made an application for a stay and Justice Brandeis stated that he would not grant a stay but that the complainant-appellant might apply to the full court for a stay.

Almost a year has elapsed since the complainant-appellant made the application to Justice Brandeis. The complainant-appellant took no steps to make the present motion until January 31, 1925. Furthermore, the complainant-appellant has not printed the record on appeal in this court. The mandate of the Circuit Court of Appeals for the Second Circuit was filed in the United States District Court for the Southern District of New York on January 13, 1925 and it is, therefore, impossible for this court to grant an order withholding the mandate of the Circuit Court of Appeals.

It is respectfully submitted that this court should not grant an order suspending the enforcement of the injunction granted herein for the reasons set forth above and for the further reason that there is no merit in the present application, as will appear from the opinion of the United States District Court for the Southern District of New York and the opinion of the Circuit Court of Appeals for the Second Circuit and from the denial of a stay by Judge Rogers.

WHEREFORE, deponent prays that the motion of the complainant-appellant for a stay be denied.

FRANCIS DEAN.

Sworn to before me this 11th day of February, 1925.

FREDERICK T. FROST,
Notary Public, Kings Co. No. 33
[SEAL] Kings Co. Register's No. 6033
Certificate filed N. Y. Co. No. 60
N. Y. Co. Register's No. 6115
Commission expires Mar. 30 1926

Exhibit "A".

(Judge Hand's Order)

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

FRANK MOORE, President of Odd-Lot Cotton Exchange of New York, *Complainant,* *against* THE NEW YORK COTTON EXCHANGE, THE WESTERN UNION TELEGRAPH COMPANY and GOLD AND STOCK TELEGRAPH COMPANY, *Defendants.*	In Equity No. 26—9.

This cause came on to be heard at this Term and was argued by John M. Coleman, of counsel for the complainant, and Henry W. Taft and Henry S. Robbins, of counsel for the defendants, and it appearing that complainant has made a motion for a preliminary injunction restraining defendants from refusing to furnish to complainant and the members of the Odd-Lot Cotton Exchange of New York the continuous cotton quotations of the New York Cotton Exchange, and defendants have made a motion for a preliminary injunction, as prayed for in their answers and counterclaims, enjoining complainant or the members, officers and agents, of the Odd-Lot Cotton Exchange of New York from receiving, using or distributing the said continuous quotations of the New York Cotton Exchange, and it appearing to the satisfaction of the court that complainant and the members of the said

Odd-Lot Cotton Exchange of New York are now either purloining said continuous quotations of The New York Cotton Exchange or receiving them from some person who is purloining them and giving the same to complainant and the members of said Odd-Lot Cotton Exchange without the permission of the defendant, the New York Cotton Exchange, and that said unauthorized receipt and use of said quotations by complainant and the members of said Odd-Lot Cotton Exchange will seriously and irreparably impair the value of said continuous quotations of the New York Cotton Exchange and defeat the efforts of said Exchange to prevent the use of said quotations in bucket shops, and will materially and irreparably impair the right of said New York Cotton Exchange to derive a revenue from the distribution of said quotations unless said unauthorized receipt and use thereof is enjoined, and thereupon, upon consideration thereof, it was

ORDEDED, ADJUDGED AND DECREED as follows:

FIRST: That complainant's motion for a preliminary injunction be and the same is hereby in all respects denied.

SECOND: That defendants' motion for a preliminary injunction be and the same is hereby in all respects granted, and that complainant and each and every of the officers, members, agents, employees and servants of the Odd-Lot Cotton Exchange of New York be and they hereby are enjoined and restrained from receiving, using, selling or distributing, directly or indirectly, the continuous quotations of New York Cotton Exchange (meaning thereby all quotations wherein the price of cotton shall be quoted oftener than at intervals of fifteen minutes) or any of them, and from having, maintaining or permitting telegraph or other wires running into or through complainant's office or Exchange, over which said continuous quotations, or any of them, are passing,

and complainant and the members of said Odd-Lot Exchange of New York be and hereby are restrained and enjoined from aiding, abetting or assisting, directly or indirectly, any member of said Odd-Lot Cotton Exchange, or any other person, firm or corporation in using, selling or distributing said continuous quotations, or any of them, until it, he or they shall have first lawfully acquired the right to receive quotations, either by contract or purchase, from the New York Cotton Exchange, or with its consent and approval, from one of the Telegraph Companies authorized by it to distribute such quotations, and it is further

ORDERED, ADJUDGED AND DECREED that the defendants file an undertaking in the penal sum of Thirty thousand dollars ($30,000.), with a surety to be approved by the Clerk of this Court, conditioned upon the payment of such costs and damages to the complainant as may be suffered by him if he be found to have been wrongfully enjoined or restrained hereby.

Dated, New York, March 26, 1923.

LEARNED HAND,
United States District Court.

Exhibit "B".

(Judge Hand's Opinion)

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

FRANK MOORE, President of the Odd-Lot Cotton Exchange of New York, *Complainant,* *against* NEW YORK COTTON EXCHANGE, THE WESTERN UNION TELEGRAPH COMPANY and the GOLD AND STOCK TELEGRAPH COMPANY, *Defendants.*	E 26—9.

Motion for preliminary injunction upon a counterclaim in equity. The plaintiff opposes on the ground that the counterclaim is not within the jurisdiction of the District Court.

The bill is under the Anti-Trust laws. It alleges that the three defendants by contract in restraint of trade have refused the plaintiff "quotations" of cotton sales on the New York Cotton Exchange, by which alone the plaintiff can conduct its business of selling "odd-lots" of cotton bales, i. e., lots of less than one hundred bales. Such quotations are necessary to the conduct of the plaintiff's business since they represent the transactions taking place on the New York Cotton Exchange which fixes the market everywhere. The defendants furnish such quotations to all persons of whom they approve and deny

the plaintiff that right in an effort to suppress competition.

The answer denies the purpose to suppress competition, but admits that the defendants have refused to give the quotations to the plaintiff. This refusal they justify because the plaintiff is not engaged in honest business, but either "buckets" its customers' orders or transmits those orders to "bucket-shops" or both. The refusal arises from the defendants' desire to promote honest dealing in cotton. The counterclaim which is incorporated with the answer alleges that the plaintiff, not being able to get the quotations from the defendants either "purloins" the quotations from the defendants or gets them from one who does. When received it uses them for the purpose of "bucketing" orders or enabling "bucket-shops" to do so elsewhere. It asks an injunction against the plaintiff's continuation of this practice.

HENRY W. TAFT and HENRY S. ROBBINS for the motion.

JOHN M. COLEMAN opposed.

LEARNED HAND, *D. J.*: Under Equity Rule 30 there would concededly be no objection to the counterclaim if substantive jurisdiction existed. However, there is not the necessary diversity of citizenship between the plaintiff and the defendants and therefore the counterclaim will lie only if ancillary to the main controversy, the Rule being incapable of extending the constitutional jurisdiction of the District Court. The question therefore is this: Is it necessary to a complete disposition of the subject matter of the bill and to the protection of the rights involved, if the defendants are correct that the counterclaim should be entertained? This is the result of the cases, Stillman *v.* Combe, 197 U. S. 436; Raphael *v.* Trask, 194 U. S. 272; Cleveland etc. Co. *v.* Galien etc. Co., 243 Fed. R. 405, 407; Hoag *v.* Hoag, 107 Fed. R. 807, affirmed 154 Fed. R. 1003, (C. C. A. 2). The same reasoning lies at the basis of the common rule that when a court

has custody of a res, it will entertain all controversies touching claims upon it. The case turns upon an analysis of the pleadings with an eye to this principle.

The bill rests upon a tort, the refusal of the defendants to furnish the quotations to the plaintiff in pursuance of an unlawful agreement to suppress competition. The right of the defendants to withhold its quotations for other reasons is necessarily conceded, but it has no right to make its refusal a step in a scheme to monopolize the business of dealing in cotton. The answer admits the refusal but denies that it is a step in any such agreement. It asserts the defendants' right to withhold the quotations from this plaintiff because of other reasons.

Thus if the defendants succeed, the decree will either expressly or by implication declare that the defendants have the right to withhold the quotations and that the plaintiff has no right to receive them. On the assumption that the defendants will succeed, the counterclaim asks that this right be protected from the plaintiff's tort of "purloining" the quotations from the defendants' customers. The counterclaim goes upon the legal hypothesis that when the defendants have given the quotations to a customer under agreement that he shall use them only for himself, it is a tort for another to use them in his own business. Whether or not they be right is not for the moment the question, but only whether that relief demanded in the counterclaim will be ancillary to a complete disposition of the controversy in the bill.

It appears to me that it is. The defendants' whole defensive pleading is that they have the right to refuse the quotations, and that if they can establish it they should be immune in its enjoyment from unlawful attack by the plaintiff. The decree on the bill will establish their right against any attack by suit; that on the counterclaim against attack in pais. There is no reason, if the defendants establish their right by the decree, why

the plaintiff should not be forbidden from impairing the value of the decree by tortious interference. A decree under the counterclaim would do no more than secure to the defendant the complete enjoyment of a decree on the bill. It is in every sense ancillary to a complete disposition of the original controversy. Therefore, it is not necessary that there should be any independent Federal jurisdiction.

Thus the question arises on the merits. The defendants' affidavits show reason to assume that the plaintiff has been copying, or causing to be copied, the quotations from blackboards of the defendants' customers, and these affidavits are unanswered. If so, the cases support the defendants in their position; Board of Trade *v.* Christie Grain & Stock Co., 198 U. S. 236; M'Dermott Com. Co. *v.* Board of Trade, 146 Fed. R. 961, (C. C. A. 8); Board of Trade *v.* Price, 213 Fed. R. 336, (C. C. A. 8).

Therefore the defendants are entitled on this showing to an injunction forbidding the plaintiff from taking their quotations for distribution among its customers. This protects the status quo until after hearing it can be determined whether the defendants are engaged in an unlawful conspiracy.

Motion granted.

March 17, 1923.

LEARNED HAND,
D. J.

United States Circuit Court of Appeals

For the Second Circuit

FRANK MOORE, President of the Odd-Lot Cotton Exchange of New York,
Complainant,
against
THE NEW YORK COTTON EXCHANGE, THE WESTERN UNION TELEGRAPH CO., and THE GOLD & STOCK TELEGRAPH CO.,
Defendants-Appellees,
FRANK MOORE, President of the Odd-Lot Cotton Exchange of New York,
Appellant.

Before:

ROGERS, MANTON and MAYER,
Circuit Judges.

CADWALADER, WICKERSHAM & TAFT,
For Appellee, New York Cotton Exchange;
HENRY W. TAFT,
HENRY S. ROBBINS,
GEORGE COGGILL,
of Counsel.

FRANCIS R. STARK,
For Appellees, The Western Union Telegraph Company and the Gold & Stock Telegraph Company.

JOHN M. COLEMAN,
For Appellant;
OSCAR B. BERGSTROM,
of Counsel.

This cause comes here on appeal from the United States District Court for the Southern District of New York.

The Odd-Lot Cotton Exchange, for whose benefit and that of its members this action was brought is an unincorporated association organized and operating under the laws of the State of New York. Its President is authorized by the laws of that State to bring suits in his own name on its and its members behalf. It has a membership of 100 or more and maintains an Exchange in the City of New York wherein its members buy and sell cotton for future delivery without limit as to quantity, except that no lot bought or sold shall be less than 10 bales, nor more than 100 bales. It is otherwise unlimited as to the quantity dealt in.

The New York Cotton Exchange is a corporation created by special legislative enactment of the State of New York. It has a membership of more than 400 and maintains an Exchange in the City of New York for the purchase, sale and exchange of cotton, and to facilitate dealings and transactions in that commodity, and to diffuse information as to prices, quotations and such other matters as relate to the trade and business of dealing in said commodity. It is unlimited as to the quantity of cotton dealt in except that no lot shall be less than 100 bales.

The Western Union Telegraph Company is also a New York corporation and it has its principal office in the City of New York. It is a public service corporation engaged in interstate commerce by transmitting messages by means of telegraph and cable wires between the various States and Territories of the United States, and between such States and Territories and foreign countries.

The Gold & Stock Telegraph Company is also a New York corporation and it likewise has its principal office in the City of New York. It also is engaged in interstate commerce and in disseminating market news and the continuous and instant quotations of cotton prices by means of ticker service located in Exchanges and Brokerage Houses and with cotton dealers throughout the United States.

This suit was brought for a violation of the Anti-Trust Laws of the United States.

It is alleged that the Odd-Lot Cotton Exchange opened its Exchange in New York City in August, 1922. And that in order to serve promptly and efficiently its members, brokers and customers it is necessary that it have what is known as a continuous ticker service owned and operated by defendants, The Western Union Telegraph Co. and the Gold & Stock Telegraph Co., and in order to procure same, complainant made application, as is required by the said two companies for said ticker service, said application being dated on or about July 1, 1922, and being the printed application required by defendants to be signed by all applicants for their continuous quotations as set forth in the contract between the New York Cotton Exchange and the Western Union Telegraph Company. In making its application it alleges that it was then able, willing and offered to pay whatever charges might be made and exacted therefor and to comply with all requirements of defendants, and is now ready, able and willing and offers to pay said charges, and to comply with all requirements of defendants. That at the time when it made its application to the Manager of the Western Union Telegraph Company its representative was informed that said application could not be granted, except upon the express consent of the New York Cotton Exchange. That since the making of said application, the said Western Union Telegraph Company and the Gold & Stock Telegraph Company have failed and refused to install a ticker for the use of complainant giving continuous cotton quotations, as called for in the application, and the New York Cotton Exchange has failed and refused to give its consent to the installation of said ticker service for continuous cotton quotations.

The amended bill of complaint is of great length covering more than 20 printed pages. It is not necessary for present purposes to set forth its various allegations. But it is alleged that by reason of various matters which

are set forth the "New York Cotton Exchange can and does influence and control all dealing, trading and commerce in cotton in the United States and to a large extent in foreign countries and therefore has thereby monopolized the cotton commerce in the United States, and that the free competitive flow of interstate commerce in such product is hampered, restrained and monopolized by the said defendants."

It is also alleged that "the New York Cotton Exchange is a monopoly, having complete domination and control of the cotton market for the purchase and sale for future delivery, as hereinbefore alleged; that it has complete control over the receipt and dissemination of the market quotations from foreign markets, and of the establishment and dissemination of the quotations in the City of New York, and of the manner, and to whom, same may be disseminated from the City of New York and to other Exchanges in the United States."

It is further alleged that the contract "hereinbefore alleged between the New York Cotton Exchange and the Western Union Telegraph Co. and the Gold & Stock Telegraph Co. is in restraint of trade and commerce among the several States, and was made and entered into pursuant to a conspiracy on the part of the New York Cotton Exchange and its members, constituting said exchange, in restraint of trade and commerce among the States."

It is further alleged that the "contract between the New York Cotton Exchange and the Western Union Telegraph Company and the Gold & Stock Telegraph Company, and the refusal of the New York Cotton Exchange to allow the Odd-Lot Cotton Exchange of New York to install a cotton ticker, and have the continuous cotton quotations, while allowing same to its competitors as hereinbefore alleged, constitute an unfair method of competition in commerce contrary to the acts of Congress in such cases made and provided."

The Amended Bill of Complaint asked a decree:

1. Adjudging the New York Cotton Exchange to be a monopoly.

2. That the contract existing between the defendants be cancelled and declared void, concerning the installation of tickers and the giving of continuous cotton quotations.

3. That the defendants be perpetually restrained from carrying out the said contract, and be restrained from refusing to install in the exchange of the Odd-Lot Cotton Exchange of New York a ticker for the purpose of receiving continuous cotton quotations, and from further refusing to give and disseminate to the Odd-Lot Cotton Exchange of New York, and its members, the continuous cotton quotations, the same as is furnished to and disseminated by the New York Cotton Exchange, through the said two telegraph companies, defendants, to other exchanges, individuals, corporations and brokers.

4. That the New York Cotton Exchange, its agents, servants, officers, attorneys and legal representatives, be further enjoined from in any manner discriminating against the Odd-Lot Cotton Exchange of New York, or any of the members thereof, and that it be enjoined from instructing its members not to deal with the members of the Odd-Lot Cotton Exchange of New York, and from refusing to allow its said members to so deal, and from refusing to allow its members to furnish to the members of the Odd-Lot Cotton Exchange, with whom they deal, the cotton quotations, continuous and otherwise, as may be requested from time to time by the members of the Odd-Lot Cotton Exchange for their use in their transactions with members of the New York Cotton Exchange.

The defendants in their answers admitted that they have refused to install a ticker in complainant's Exchange to supply it with continuous quotations. They also admit that they have entered into a contract by which the Western Union Telegraph Company is allowed to furnish the quotations of the New York Cotton Exchange to anyone of whom said Exchange approves but deny that the purpose or effect of the contract is to restrain trade or commerce or prevent competition. The New York Cotton Exchange also alleges that when it

received the application of the complainant for a ticker it made a careful investigation of the character and purposes of appellant and of its members and found that it had been organized to succeed the American Cotton Exchange; that many of the active members of the appellant Exchange had been active members of the American Cotton Exchange, which had been convicted in the Supreme Court of the State of New York of conducting a bucket shop under Sections 390 and 393 of the Penal Law; that the Odd-Lot Exchange was organized for the purpose of permitting its members to conduct bucket shops under the guise of being members of an Exchange; that for this reason the New York Cotton Exchange refused to permit its quotations to be furnished to appellant and for the further reason that there is no commercial necessity or reason for the existence of a cotton exchange such as appellant's, whereon contracts for the future delivery of cotton in less than 100-bale lots are made and that such an exchange is conducive to improper speculation by persons of small means and inadequate knowledge.

The New York Cotton Exchange also asserted in its answer that it had the legal right to safeguard its quotations and to refuse to give them to any person who, in its opinion, would not safeguard them or would misuse them or give them to others who would use them for the purpose of promoting bucket shops or improper speculation, and that, upon the question whether any applicant for the quotations desired them for an improper purpose, the judgment of the New York Cotton Exchange was final and not subject to judicial review.

All of the defendants set up as a defense and counterclaim in their answers that, although the complainant had been refused permission to use the continuous quotations of the New York Cotton Exchange, it was either purloining the quotations of the defendants or receiving them from some person who is purloining them, and is giving the same to its members, who in turn are distributing them over telegraph wires to many offices in the

Southern States, wherein bucket shops are conducted, and wherein said quotations are displayed on blackboards for the purpose of promoting the conduct of said bucket shops, and that the unauthorized receipt and use of said quotations by said complainant and its members is calculated to and in time will, if not entirely stopped, seriously impair the value of the defendants' quotations and ultimately entirely defeat the efforts of the defendants to prevent the use of such quotations in bucket shops as a basis of illegal bets, and will also materially impair the right of the defendants to derive a revenue from the distribution of the quotations.

The defendants prayed that an injunction might issue restraining the Odd-Lot Cotton Exchange, its officers, agents, employees and servants from receiving, using, selling, or distributing, directly or indirectly, the quotations of the New York Cotton Exchange, or any of them, and from having, maintaining or permitting any telegraph or other wire running into or through its office or exchange, over which said quotations, or any of them, are passing, and from aiding, abetting or assisting, directly or indirectly, any member of the Odd-Lot Cotton Exchange, or any other person, firm or corporation, in the City of New York, in selling or distributing said quotations or any of them, until it, he or they shall have first lawfully acquired the right to receive said quotations, either by contract from the New York Cotton Exchange or, with its consent and approval, from one of the telegraph companies authorized by said New York Cotton Exchange to distribute such quotations.

After answer the complainant moved the Court for a preliminary injunction restraining the defendants from refusing to furnish to it and its members the continuous cotton quotations of the New York Cotton Exchange. The defendants also moved for a preliminary injunction enjoining the complainant.

The motions for the injunctions were heard on the bill, answers and affidavits.

The District Court denied the complainant's motion for an injunction, and granted the motion of the defendants upon the defendants filing a bond in the sum of $30,000 conditioned upon the payment of such costs and damages to the complainant as might be suffered by him if he be found to have been wrongfully enjoined. From the order, entered on March 26, 1923, denying the complainant's motion for an injunction and granting the motion of the defendants for an injunction against the complainant, the latter appealed to this Court.

ROGERS, Circuit Judge (after stating the above facts): It appears that the New York Cotton Exchange provides an Exchange Room in the City of New York where its members meet and make contracts for themselves or as brokers for customers, for the purchase and sale of cotton for future deliveries. Their transactions aggregate many million bales of cotton annually. The contracts are made on the Exchange between 10 A. M. and 3 P. M. by open *viva voce* bidding. It claims that the knowledge of the prices upon which these contracts are based constitutes a peculiar kind of property and that their value depends on the right to confine the distribution of the quotations to such telegraph companies as will contract with the Exchange therefor and to such customers as will agree with the telegraph companies and the Exchange not to furnish them to others. The Western Union Telegraph Company pays to the Exchange annually a considerable sum of money for the privilege of receiving these quotations and distributing them to those customers of whom the Exchange approves. If any person can promptly acquire these quotations, surreptitiously, and without paying therefor and can give them out to others, the telegraph companies would be put at a disadvantage in competing with such persons and would no longer be willing to pay to New York Cotton Exchange the annual sum now paid to it for the privilege of receiving these quotations.

The complainant does not challenge the claim of the Cotton Exchange that it has a property right in the

quotations. Indeed, its right to come into equity for the relief which it seeks assumes that the quotations constitute a species of property. It is that upon which the jurisdiction of equity depends, as courts of equity are concerned only in the protection of property rights. And the right to acquire property is as much entitled to protection as the right to protect property already acquired. *International News Service* v. *The Associated Press*, 248 U. S., 215, 236. And in *Board of Trade* v. *Christie Grain and Stock Co.*, 198 U. S., 236, 250, the Supreme Court held that quotations of prices or dealings upon a board of trade communicated on confidential terms to numerous persons under a contract not to make them public were entitled to the protection of the law. And see *Hunt* v. *New York Cotton Exchange*, 205 U. S., 322.

But all the parties to this suit are citizens of the State of New York, so that the jurisdiction of the Court in this case does not rest upon diversity of citizenship. If jurisdiction of the bill exists it must be because the acts complained of therein violate the Federal Anti-Trust Laws.

It is plain that the bill cannot be maintained under the Federal Trade Commission Act of 1914 (38 Stat., 717). That Act declares that unfair methods of competition in commerce are unlawful and the Commission is empowered to prevent persons, partnerships or corporations, with certain exceptions, from using such methods of competition. But as the only relief that Act provides is before the Federal Trade Commission, it affords no support whatever for the bill now before us.

The Sherman Act to protect trade and commerce against unlawful restraints and monopolies, being the Act of July 2, 1890, invested the District Courts with jurisdiction to protect trade and commerce against unlawful restraints and monopolies. That Act made it the duty of the several district attorneys in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain violations of the Act. It did not authorize a suit

by an individual or corporation for injunctive relief in a Federal Court. It affords no support, therefore, for this suit.

But the Act of October 15, 1914, known as the Clayton Act, in Section 16, provided that any person, firm, corporation, or association, shall be entitled to sue for and have injuctive relief in any court of the United States having jurisdiction over the parties against threatened loss or damage by a violation of the anti-trust laws when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity under the rules governing such proceedings. 38 St., Part 2, ch. 323, p. 737. And it has been held in *General Investment Company* v *Lake Shore & Michigan Southern Railway Company*, 260 U. S., 261, 287, that the right to sue thus given is to be exercised only in "a court of the United States." It cannot be asserted in a State court.

The Sherman Anti-Trust Act provides as follows:

> "Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. * * *
>
> Section 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States * * * shall be deemed guilty of a misdemeanor * * * *." 26 Stat., 209.

So that the question which we have to determine is whether the contract which the New York Cotton Exchange has made with the Western Union Telegraph Company, respecting the quotations on the Exchange, is a contract in restraint of trade or commerce, or whether there is shown on the part of the defendants or any of them a monopoly or an attempt to monopolize any part of interstate commerce.

The Supreme Court in *Standard Oil Company* v. *United States*, 221 U. S., 1, and in *United States* v. *American Tobacco Co.*, 221 U. S., 106, construed the Anti-Trust Act as prohibiting only contracts or acts which were *unreasonably* restrictive of competitive *conditions*, and in the case last cited the Court quoted approvingly from the opinion in the *Joint Traffic* case, 171 U. S., 505, 568, the statement that "The Act of Congress must have a reasonable construction, or else there would scarcely be an agreement or contract, among business men that could not be said to have, indirectly or remotely, some bearing on interstate commerce, and possibly to restrain it."

As construed by the Supreme Court in the cases cited and in those about to be cited, the Sherman Act is not construed as forbidding or restraining the power to make normal and usual contracts to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplish such purpose. And see *United States* v. *Union Pacific R. R. Co.*, 226 U. S., 61; *United States* v. *Reading Co.*, 226 U. S., 324; *Nash* v. *United States*, 229 U. S., 373; *Eastern States Lumber Association* v. *United States*, 234 U. S., 600.

The cases disclose that where the facts clearly show that the purpose of a contract is not to regulate, obstruct or restrain interstate commerce, but that the object is properly and fairly to regulate the transaction of the business in which the parties to it are engaged, the agreement will be upheld as not within the Statute. The contract is good if "it can be seen that the character and terms of the agreement are well calculated to attain the purpose for which it was formed, and where the effect of its formation and enforcement upon interstate trade or commerce is in any event but indirect and incidental, and not its purpose or object." *Anderson* v. *United States*, 171 U. S., 604.

And the record in this case discloses that the intention and purpose of the parties in making the contract which the complainant attacks in this suit was a proper

and legitimate one. Prior to 1903 the telegraph companies were at liberty to gather quotations in the Exchange Room and to sell them to anyone desiring them. The only motive of the telegraph companies was profit, and the more customers the greater the profit. But it is said this resulted in the creation of many bucket shops throughout the country, where the quotations were posted on a blackboard and the keeper of the bucket shop accepted all offers of persons resorting to his place to bet on the fluctuations of prices as indicated by such quotations, these alleged trades or bets being opened at the last price on the blackboard and being closed when the blackboard price reached a point where the customer's margins became exhausted, or where prior thereto the customer desired to close his trade at the last named price thus essential to the conduct of such business. The use by these institutions throughout the country of these quotations necessarily brought the New York Cotton Exchange and other regular exchanges into discredit with the public, it being supposed, from the presence of these quotations, that these bucket shops were in some way connected with these exchanges. To correct this condition and suppress these gambling places, so far as they were operating on its quotations, the New York Cotton Exchange made a contract in 1903, requiring the telegraph companies—in order to acquire the quotations—to enter into a contract with the Exchange substantially in the form of the contract herein involved. The purpose was, so it is said, to confine the distribution of the quotations to those desiring them for lawful purposes, and to thereby exclude their being given to persons who would not carefully safeguard them and confine them to their own offices. To the success of this purpose, it was essential that the quotations should be kept, not only from the bucket shops themselves, but from all persons who should acquire them for the purpose of surreptitiously re-transmitting them to bucket shops. To this end, the contract provided for a written application to be signed by each person desiring the quotations, in

which he should agree with the Exchange and the telegraph companies, not only that the applicant would not himself use the quotations in conducting a bucket shop, but that he would confine the quotations to his own office, and not permit them to be communicated therefrom.

This plan to prevent the misuse of quotations necessarily imposed, either upon the Exchange or the distributing telegraph company, the burden of determining the character and purpose of each applicant for the quotations. The telegraph company had no pecuniary interest in restricting the number of its customers for quotations. The only person having a real interest in preventing the misuse of the quotations was the Exchange itself, and the contract conferred upon the Exchange the right and duty to pass upon the character and purpose of each applicant and make its decision final by providing that the telegraph company should not furnish the quotations to anyone whose application was disapproved by the Exchange.

It cannot be said that the contract involved was entered into for the purpose of restraining trade or of creating a monopoly. It appears to us that its purpose was that of properly regulating the transaction of the New York Cotton Exchange and of preventing the misuse of its quotations. It is not a contract in restraint of trade or commerce within the meaning of Section 1 of the Sherman Act as construed by the Supreme Court. Neither is it an attempt to monopolize trade or commerce among the several States within the meaning of Section 2 of the Sherman Act.

The New York Cotton Exchange has the property right in the quotations which it collects. As such owner the Exchange is under no legal duty to sell its quotations to any particular person nor to all because it sells to some. These quotations relate solely to the business of the Exchange, which is under no obligation to communicate them, and the telegraph company, as its agent, communicates them to those persons to whom the Exchange permits the communication to be made. In this we see no illegality. *Whitwell* v. *Continental Tobacco*

Co., 125 Fed., 454; *Matter of Renville*, 46 App. Div. (N. Y.), 37. So far as the contract limits the right of the telegraph company to communicate the quotations to such persons as the Exchange approves we are unable to distinguish this case from that of *Board of Trade* v. *Christie Company*, 198 U. S., 236. That case involved a contract made by the Chicago Board of Trade with the telegraph companies for the distribution of its quotations. The Supreme Court held that contracts under which the Board of Trade furnished the telegraph companies with its quotations, on condition that they would only be distributed to persons in contractual relations with, and approved by the Board, and not to what are known as bucket shops, were not void as being in restraint of trade, either at common law or under the Anti-Trust Act. The Court held the Board of Trade was entitled to an injunction enjoining the defendants from using and distributing the continuous quotations of prices on sales of grain and provisions for future delivery, and which the defendant could not obtain except through a known breach of the confidential terms on which the plaintiff communicated them.

The complainant asks a mandatory injunction compelling the defendants to furnish to it the continuous quotations of prices of contracts for the future delivery of cotton made on the New York Cotton Exchange. The transactions in which the latter Exchange is engaged and in which the complainant itself is engaged constitute, it is claimed, interstate commerce. The bill alleges that the purchases and sales made on the Exchanges "constitute a large and important part of the Interstate Commerce as between said cotton growing States and other States, including the State of New York. That in addition to the said interstate sales and purchase as alleged for delivery from said States, through and into many States of the United States, and into the State of New York, the said Interstate Commerce involves the interstate shipments and transportation of said commodity, through and from said cotton growing States, to the

State of New York, whence it is consigned and shipped to other cotton markets of the United States and Foreign Countries for manufacture." The contracts made on the New York Cotton Exchange are made in the Board Room of the Exchange in the City of New York and they provide that the cotton is deliverable from licensed warehouses in the Port of New York. Performance of the contract is made by the delivery of negotiable warehouse receipts issued by licensed warehouses in New York. There is no obligation to make delivery at any place except in the Port of New York. Such a transaction is local in its character and does not involve interstate commerce. The decisions of the Supreme Court make this clear. In *Hopkins* v. *United States*, 171 U. S., 578, it was held that the Kansas City Live Stock Exchange was not engaged in interstate commerce under the following circumstances: It received consignments of cattle from owners in other States upon an understanding that they should be sold and the net amount realized on the sale returned to the owners. In its opinion the court said:

> " * * * it is immaterial over how many States the defendants may themselves or by their agents travel in order to thereby secure the business. They do not purchase the cattle themselves; they do not transport them. They receive them at Kansas City, and the complaint made is in regard to the agreements for charges for the services at that point in selling the cattle for the owner. Thus everything at last centres at the market at Kansas City, and the charges are for services there, and there only, performed.
>
> The selling of an article at its destination, which has been sent from another State, while it may be regarded as an interstate sale and one which the importer was entitled to make, yet the services of the individual employed at the place where the article is sold are not so connected with the subject sold as to make them a portion of interstate commerce, and a combination in regard to the amount to be charged for such service is not, therefore, a combination in restrain of that

> trade or commerce. Granting that the cattle themselves, because coming from another State, are articles of interstate commerce, yet it does not therefore follow that before their sale all persons performing services in any way connected with them are themselves engaged in that commerce, or that their agreements among each other relative to the compensation to be charged for their services are void as agreements made in restraint of interstate trade."

There are other decisions of that court which assert a like doctrine. See *Anderson* v. *United States*, 171 U. S., 604; *Ware & Leland* v. *Mobile County*, 209 U. S., 405, 413; *Hill* v. *Wallace*, 259 U. S., 44.

The complainant relies upon *Board of Trade of the City of Chicago* v. *Olsen*, 262 U. S., 1. That case involved an appeal from a decree which dismissed a bill in equity brought by the Board of Trade to enjoin certain United States officials from taking steps to enforce the Act of Congress of September 21, 1922, known as the Grain Futures Act, the constitutionality of which Act was directly involved. That case is not distinguishable in principle from that of *Stafford* v. *Wallace*, 258 U. S., 495, which involved the constitutionality of the Packers and Stockyards Act of 1921. In neither case has the court overruled the cases heretofore cited in this opinion in which sales on the Exchanges were regarded as transactions in intrastate commerce and not in interstate commerce. It sustained the right of Congress to regulate in the one case the boards of trade and in the other the various stockyards of the country as great national public utilities. The Acts involved assumed that the corporations regulated by the Acts conducted a business affected by a public use of a national character and that they were therefore subject to national regulation. These cases show that the power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter. We find another illustration of the principle in the

Transportation Act of 1920, which authorizes supervision by the Interstate Commerce Commission, of intrastate commerce where it is so carried on as to favor persons or localities in intrastate commerce as against those in interstate commerce. See *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U. S., 563; *The Minnesota Rate Cases*, 230 U. S., 352, 399.

But we find nothing in *Stafford* v. *Wallace (supra)* or in *Chicago Board of Trade* v. *Olsen*, or in any decision of the Supreme Court which supports the complainant's contention that the New York Cotton Exchange is engaged in interstate commerce. Neither are we cited to any Act of Congress which entitles the complainant to maintain its bill. And we conclude that the bill itself must be dismissed.

Equity Rule 30 (198 Fed., xxvi) permits the defendant in his answer to "state in short and simple form any counterclaim arising out of the transaction which is the subject-matter of the suit, and may without cross-bill set out any set-off or counterclaim against the plaintiff which might be the subject of an independant suit in equity against him, and such set-off or counterclaim, so set up, shall have the same effect as a cross-suit, so as to enable the court to pronounce a final judgment in the same suit both on the original and cross claims." Under this rule if defendant has an independent cause of action in equity against the plaintiff he may counterclaim it. And a counterclaim so pleaded being in effect a "cross-suit" is not affected by a decree dismissing the bill on the merits. *Buffalo Specialty Co.* v. *Vancleef*, 217 Fed., 91.

The counterclaim sets up a cause of action within the jurisdiction of the District Court as a court of equity and within its jurisdiction as a federal court. On the dismissal of the complainant's bill the counterclaim in this suit is entitled to be treated as an original bill within the rule laid down by this court in *Vidal* v. *South American Securities Co.*, 276 Fed., 855, 875, and the au-

thorities there cited. It has frequently been said to be the general rule that the dismissal of the original bill carries with it a cross-bill. *United States* v. *California, &c. Land Co.*, 192 U. S., 355; *Dows* v. *Chicago*, 11 Wall., 108; *Cross* v. *DeValle*, 1 Wall., 1; *Ulman* v. *Iaeger's Adm'r.*, 155 Fed., 1011; *Markell* v. *Kasson*, 31 Fed., 104; *Glos* v. *People*, 259 Ill., 332; *Bell* v. *McLaughlin*, 183 Ala., 548. But it is generally recognized that the dismissal of the original bill does not necessarily carry with it a cross-bill. Whether it has that effect depends upon whether the cross-bill is defensive merely or sets up new facts and prays for affirmative relief against the plaintiffs in the original bill and shows grounds for equitable relief which may uphold the jurisdiction of the court independent of the original bill (21 C. J., 514).

Where, as here, the bill and the counterclaim relate to the same subject-matter, it is quite immaterial that in the case of a cross-bill, and the same principle applies to a counterclaim, the parties thereto are citizens of the same State, and no diversity of citizenship exists. The cross-bill and the original suit are but one cause, and jurisdiction of the latter includes the former. If the court has jurisdiction of the original bill it has jurisdiction of the cross-bill without reference to the citizenship of the parties, and the cross-bill need not disclose grounds of federal jurisdiction. *Shields* v. *Barrow*, 17 How., 130; *Freeman* v. *Howe*, 24 How., 450, 460; *Cross* v. *DeValle*, 1 Wall., 1, 14; *Railroad Companies* v. *Chamberlain*, 6 Wall., 748; *Krippendorf* v. *Hyde*, 110 U. S., 276; *Phelps* v. *Oaks*, 117 U. S., 236; *Hogg* v. *Hoag*, 107 Fed., 807, aff'd 154 Fed., 1003; *Portland Wood Pipe Co.* v. *Slick Bros. Const. Co.*, 222 Fed., 528; *Cleveland Engineering Co.* v. *Galion Dynamic Motor Truck Co.*, 243 Fed., 405. Jurisdiction having attached on the allegations contained in the bill the court may, upon the hearing, dismiss the bill and grant relief under the counterclaim, although the counterclaim could not have been sustained as an original bill for lack of jurisdiction.

The counterclaim does not bring in any new subject-matter. It relates to the same contract upon which the amended bill is based and to the quotations of the New York Cotton Exchange which the complainant seeks to obtain by having the contract declared illegal. The counterclaim does not introduce new and distinct matters into the litigation. The subject-matter is the same in both.

We are thus brought to a consideration of the counterclaim on the merits. The defendant charged on information and belief the fact to be that the plaintiff either itself purloined the quotations of the defendant Exchange, or that it received them from some person who is purloining them and giving them to its members. When the equity of a bill rests upon the existence of a particular fact it is necessary that that fact should be clearly alleged. And the allegations of a bill seeking an injunction must be specific. Allegations made upon information and belief are, as a rule, insufficient. In any case where the matters do not lie within the personal knowledge of the plaintiff he may allege those matters upon information and belief; but the statements of the bill as to such matters should be corroborated as far as possible by the affidavits of persons having personal knowledge. Street's Equity Practice, vol. 3, p. 1351, sec. 2307. *United States* v. *Butler,* 278 Fed., 677; *In re United States Wireless Telegraph Co.,* 201 Fed., 445; *Leavenworth* v. *Pepper,* 32 Fed., 718; *Brooks* v. *O'Hara,* 8 Fed., 529.

In the instant case, while the allegations of the counterclaim as to the purloining of the quotations, by the complainant, or as to its receiving them from someone who is purloining them, are upon information and belief, they are sufficiently supported by the affidavits which were presented to the Court in support of the counterclaim. Moreover, while the complainant in its reply denied that it is itself purloining the quotations, it does not deny in any pleading or affidavit that it is receiving them. The right of the New York Cotton Exchange to

protect by injunction its right in the quotations which it collects is, under the circumstances disclosed, indisputable. As the Court said in the similar case of *Board of Trade* v. *Christie Grain & Stock Co.*, 198 U. S., 236, 250:

> "* * * the plaintiff's collection of quotations is entitled to the protection of the law. It stands like a trade secret. The plaintiff has the right to keep the work which it has done, or paid for doing, to itself. The fact that others might do similar work, if they might, does not authorize them to steal the plaintiff's. Compare *Bleistein* v. *Donaldson Lithographing Co.*, 188 U. S., 239, 249, 250. The plaintiff does not lose its rights by communicating the result to persons, even if many, in confidential relations to itself, under a contract not to make it public, and strangers to the trust will be restrained from getting at the knowledge by inducing a breach of trust and using knowledge obtained by such a breach."

See *Exchange Telegraph Co.* v. *Gregory & Co.* (1896), 1 Q. B. D., 147; *F. W. Dodge Co.* v. *Construction Information Co.*, 183 Mass., 62; *Board of Trade* v *C. B. Thomson Commission Co.*, 103 Fed., 902; *Board of Trade* v. *Hadden-Krull Co.*, 109 Fed., 705; *National Tel. News Co.* v. *Western Union Tel. Co.*, 119 Fed., 294; *Illinois Commission Co.* v. *Cleveland Tel. Co.*, 119 Fed., 301; *Board of Trade* v. *McDearmott Commission Co.*, 143 Fed., 188, 190; *McDearmott Commission Co.* v. *Board of Trade*, 146 Fed., 961, 962; *Board of Trade* v. *Cella Commission Co.*, 145 Fed., 28; *Board of Trade* v. *Price*, 213 Fed., 336.

The order appealed from, which denied the complainant's motion and granted the defendant's for a preliminary injunction, is affirmed. And the Court below is directed to dismiss the complainant's amended bill.

I, HENRY W. TAFT, attorney and counselor at law duly admitted to practice in this Court, do hereby certify that I have examined the foregoing papers in opposition to complainant-appellant's motion for a stay and that the motion is without merit and ought, therefore, to be denied.

Dated, February 20th, 1925.

HENRY W. TAFT,
Counsel for Appellees.

JAN 27 1926
WM. R. STANSBURY
CLERK

Supreme Court of the United States

No. 200—October Term, 1925.

FRANK MOORE, President of the Odd Lot Cotton Exchange of New York,

Appellant,

vs.

THE NEW YORK COTTON EXCHANGE, THE WESTERN UNION TELEGRAPH COMPANY, and THE GOLD & STOCK TELEGRAPH COMPANY,

Appellees.

BRIEF FOR APPELLEE, THE NEW YORK COTTON EXCHANGE.

HENRY W. TAFT,
Solicitor for Appellee,
The New York Cotton Exchange.

HENRY W. TAFT,
GEORGE COGGILL,
Of Counsel.

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IN THE

Supreme Court of the United States

October Term, 1925, No. 200

FRANK MOORE, President of The Odd-Lot Cotton Exchange of New York,
Appellant,

against

THE NEW YORK COTTON EXCHANGE, THE WESTERN UNION TELEGRAPH COMPANY and THE GOLD & STOCK TELEGRAPH COMPANY,
Appellees.

BRIEF OF THE NEW YORK COTTON EXCHANGE, APPELLEE.

This is an appeal from a final decree of the United States Circuit Court of Appeals for the Second Circuit directing the entry of final judgment in favor of the appellees, dismissing appellant's Amended Bill of Complaint and enjoining the appellant from receiving or using the continuous quotations of the New York Cotton Exchange (R., pp. 69-70).

This decree also affirmed the order of District Judge Learned Hand, which (1) denied appellant's motion for a

preliminary injunction directing appellees to furnish appellant with a ticker and to supply to him the continuous quotations of said Exchange and (2) granted appellees' motion for a preliminary injunction enjoining appellant from receiving or using said continuous quotations.

The opinion of the Circuit Court of Appeals is reported in 296 Fed. Rep. 61 and is printed at page 56 of the Record.

The ground of Federal jurisdiction was that the suit was brought for an alleged violation of the Anti-Trust Laws of the United States (R., p. 2).

The amended Bill of Complaint asked for a decree: (1) adjudging the New York Cotton Exchange to be a monopoly; (2) adjudging that the contract existing between the appellees governing the distribution of continuous quotations be cancelled and declared void on the ground that it violated the Anti-Trust Laws of the United States; (3) granting a mandatory injunction directing the appellees to install in the appellant's exchange a "ticker" and directing them to furnish to the appellant by means of that instrument the continuous quotations of cotton of the appellee Exchange (R., p. 11).

The appellees in their answers denied the right of the appellant to be furnished with ticker service, and denied that appellees were engaged in monopolizing inter-state commerce in cotton or that the contract between the appellee Exchange and the telegraph companies, appellees, was in restraint of trade; and they set up as counterclaims that the appellant was purloining, or receiving from some person who was purloining, the continuous quotations of cotton prices which were the property of New York Cotton Exchange, and demanded that appellant be enjoined from receiving or using said continuous quotations.

Both appellant and appellees made motions for preliminary injunctions as prayed for in their pleadings, and the appellees submitted three affidavits in support of their motion. The motions were heard together before District Judge Learned Hand who denied appellant's motion for preliminary injunction directing the installation of a ticker and the furnishing of continuous quotations and granted appellees' motion for preliminary injunction restraining appellant from receiving or using the continuous quotations. Judge Hand's opinion is reported in 291 Fed. Rep. 681 and is printed at page 50 of the Record.

Appellant appealed from the order entered on Judge Hand's decision to the Circuit Court of Appeals for the Second Circuit. That Court affirmed the order appealed from and, by a decree dated Dec. 21, 1923, directed the District Court to dismiss appellant's Amended Bill of Complaint (R., p. 69). Thereafter the parties entered into a stipulation that the three affidavits submitted in support of appellees' motion should have

> "the force and effect of testimony in support of the counterclaims contained in the answers of defendants-appellees offered at the trial, and that the United States Circuit Court of Appeals for the Second Circuit may direct the entry of such final judgment on said counterclaims as in its opinion the Court below should enter thereon, and that the order and mandate be modified accordingly without prejudice to complainant's right, if any, to appeal to the Supreme Court of the United States" (R., p. 70).

The Circuit Court of Appeals then entered its final order directing that the order of the District Court which had been appealed from be affirmed with costs, that the District Court enter a final decree dismissing the Amended Bill of Complaint and awarding to appellees a final

injunction enjoining and restraining appellant from receiving or using said continuous cotton quotations and that a mandate issue accordingly (R., p. 70). From this decree the appellant appeals to this Court (R., p. 71).

The Pleadings.

Appellant's amended bill of complaint alleges that the three appellees have entered into a contract in restraint of interstate trade and commerce and pursuant thereto refuse to supply appellant with the continuous quotations of the prices at which contracts for the future delivery of cotton are made on the New York Cotton Exchange; that without such quotations appellant is unable to conduct its business of making contracts for the future delivery of cotton on its exchange and that appellees furnish such quotations to all persons of whom appellee New York Cotton Exchange approves but refuse them to appellant in order to prevent it from competing with New York Cotton Exchange (R., pp. 5-6, 9-10). The appellees in their answers admit that they have refused to install a ticker in appellant's Exchange to supply it with these continuous quotations (R., pp. 15, 37). The appellees also admit that they have entered into a contract by which the Western Union Telegraph Company is allowed to furnish the quotations of the New York Cotton Exchange to those only whom said Exchange approves, but they deny that the purpose or effect of the contract is to restrain trade or commerce or prevent competition (R., pp. 20-21, 37-38). The appellee the New York Cotton Exchange also alleges that when it received the application of the appellant for a ticker it made a careful investigation of the character and purposes of appellant and of its members and found that it had been organized to succeed the American Cotton Exchange; that many of the active members of the appellant Exchange had been

active members of the American Cotton Exchange, which had been convicted in the Supreme Court of the State of New York of conducting a bucket shop under Sections 390 and 394 of the Penal Law of that State; that the Odd-Lot Exchange was organized for the purpose of permitting its members to conduct bucket shops under the guise of being members of an Exchange; that for this reason the New York Cotton Exchange refused to permit its quotations to be furnished to appellant and for the further reason that there is no commercial necessity or reason for the existence of a cotton exchange such as appellant's, whereon contracts for the future delivery of cotton in less than 100-bale lots are made and that such an exchange is conducive to improper speculation by persons of small means and inadequate knowledge (R., pp. 21-22).

Appellee New York Cotton Exchange also asserted in its answer that it had the legal right to safeguard its continuous quotations and to refuse to give them to any person who, in its opinion, will not safeguard them or who will misuse them or give them to others who will use them for the purpose of promoting bucket shops or improper speculation and that, upon the question whether any applicant for the quotations desires them for an improper purpose, the judgment of New York Cotton Exchange is final and not subject to judicial review (R., p. 22).

All of the appellees set up as a defense and counterclaim in their answers that, although appellant had been refused permission to use the continuous quotations of New York Cotton Exchange, it was either itself purloining them, or was receiving them from some person who was purloining them, that it was giving them to its members who were distributing them to bucket shops and that this seriously impaired the value of appellees' property in the quotations. Appellees asked for an injunction against appellant to put a stop to this practice (R., pp. 21-23, 38-39).

The fact that the appellant, although not authorized to receive the continuous quotations of the New York Cotton Exchange, is, nevertheless, receiving and displaying them to its members is further established by the affidavits of Hall, Irving, Hale and Burmeister (R., pp. 41-44). Appellant does not deny that it is receiving such quotations, although it does deny that it is "purloining" them or receiving them from some person who is "purloining" them, and claims the right to receive them after they have been given out to those of whom the New York Cotton Exchange approves, on the theory that they then become public property (R., p. 46).

On the amended bill and the affidavit of James Eblin that appellant was in danger of irreparable damage appellant moved for a preliminary injunction directing appellees to furnish it with a ticker and the continuous quotations of the appellee Exchange (R., p. 12). The appellees also moved for a preliminary injunction, restraining the appellant from using or distributing such quotations, on their answers and on the affidavits of Hall, Gardner, Hale and Burmeister and they also submitted in opposition to appellant's motion the affidavit of Mr. Royce (R., pp. 41-44, 47). In opposition to appellees' motion appellant submitted its reply to the answer and counterclaims of the appellees (R., pp. 44-47).

Facts.

The New York Cotton Exchange is a private membership corporation organized under a special Act of the Legislature of the State of New York (Chapter 365 of the Laws of 1871).

Pursuant to the purposes of its incorporation it provides an Exchange Room for the exclusive use of its members where they meet and make contracts for themselves, or as brokers for customers, for the purchase and

sale of cotton for future delivery. These transactions aggregate many million bales of cotton annually. Under the By Laws of the Exchange all contracts are made only in the Exchange Room between 10 A. M. and 3 P. M., and only by open *viva voce* bidding. The quotation or report of the prices, thus established by these contracts, has become a species of property of such value that the Western Union Telegraph Company is willing to and does pay to said Exchange the sum of $27,500, annually, for the privilege of receiving the same and distributing them to those customers of whom the Exchange approves. These quotations are a peculiar kind of property and their value depends on the power to confine their distribution to such Telegraph Companies as will contract with the New York Cotton Exchange therefor and to such customers of the Telegraph Companies as will agree with the Telegraph Companies and the Exchange not to furnish them to others. If any person can promptly acquire these quotations, surreptitiously and without paying therefor, and can give them out to others, the Telegraph Companies would be put at a disadvantage in competing with such persons and would no longer be willing to pay to New York Cotton Exchange the amount now paid to it for the privilege of receiving these quotations (R., pp. 18-19).

Collection and Distribution of Quotations.

Employees of New York Cotton Exchange stationed in its Exchange Room note on slips of paper the price in every purchase and sale made on the Exchange and deliver these slips to a telegraph operator on the floor of the Exchange who transmits the quotations over telegraph wires running through the offices of the Telegraph Company in the City of New York and thence, with the aid of reinforcing instruments, they are automatically trans-

mitted over wires running to many of the cities in the United States. In the City of New York and also in some other large cities the Telegraph Company re-distributes the quotations by the ticker system. This is done by taking the quotations from the Morse telegraph instruments and sending them by a ticker transmitter located in the office of the Telegraph Company over wires to ticker instruments located in the offices of customers. The ticker instrument prints the quotations on an unrolling spool of paper known as a "tape" (R., p. 19).

History of Contract Between New York Cotton Exchange and Western Union Telegraph Company.

Prior to July 14, 1903, the Exchange permitted the Western Union Telegraph Company and the Postal Telegraph-Cable Company to collect quotations through their own employees on the floor of the Exchange and to distribute them to their customers without any restriction. The Telegraph Companies then sold the quotations to all persons desiring them for any purpose. The result was that many persons used them in conducting bucket shops. As a result the bucket shop evil assumed such large proportions that it brought discredit upon the New York Cotton Exchange and its members in the minds of many who ignorantly supposed, from the use of the Exchange's quotations as a basis of the illegal bets in the bucket shops, that the latter were in some way chargeable to the Exchange (R., pp. 19-20).

To remedy this evil, on July 14, 1903, the Exchange withdrew its license to the Telegraph Companies to collect its quotations and distribute them indiscriminately, and adopted certain regulations to prevent the distribution of its quotations to persons conducting bucket shops (R., p. 20).

To accomplish this, the Exchange on July 14, 1903, entered into written contracts with the Western Union Telegraph Company and Postal Telegraph-Cable Company, which, with slight modifications, are now practically the same as the contract, dated April 4, 1922, which is printed as Exhibit A, annexed to the Exchange's answer at pages 23-36 of the Record. This contract provides that the Exchange at its own cost shall collect and furnish its quotations to the Telegraph Company, which may transmit the same to all persons, except those directly or indirectly engaged in the promotion or maintenance of bucket shops or other places, where such quotations are used as a basis for bets or other illegal contracts, based upon fluctuations of the prices of cotton where it is contemplated that such bets or contracts are to be settled with reference to the quotations of any exchange. The contract does not impose the duty of investigating the character of the business of the appellant upon the Telegraph Company, but provides that it shall not furnish the "continuous quotations" of the Exchange to any person until his application therefor has first been approved by the Exchange (R., pp. 20-21). The continuous quotations thus forbidden to be given out without the consent of the Exchange are defined in the contract "to mean every service of quotations wherein the price of cotton shall be quoted oftener than at intervals of fifteen (15) minutes" (R., p. 24). Any quotations other than "continuous quotations" as thus defined can be given out to anyone without the approval of the Exchange (R., p. 21). The contract further provides that each applicant for continuous quotations must sign a form of application in which he agrees not to use them in connection with a bucket shop; that the quotations are for his private use and that he will not give them out to any other person (R., pp. 27-28).

The appellant the Odd-Lot Exchange was organized to conduct business in August, 1922 (R., p. 15). It claims that it operates an exchange in New York City where its members as individuals and as brokers for customers make contracts for the future delivery of cotton in lots of not less than ten bales (R., p. 2). It applied to the Western Union Telegraph Company for a ticker to supply it with the continuous quotation. This application was submitted to the New York Cotton Exchange which, after investigation, came to the conclusion that the Odd-Lot Exchange had been organized to succeed to the business of the American Cotton Exchange which had been put out of business because convicted of conducting a bucket shop. Many of the active members of the convicted Exchange were members of the Odd-Lot Exchange. The New York Cotton Exchange also concluded that the Odd Lot Exchange was organized to enable its members to conduct bucket shops, under the guise of being members of an Exchange, and that there was no commercial reason for the existence of an Exchange whereon contracts were made for the future delivery of cotton in less than 100-bale lots and that the existence of such an exchange would be conducive to improper speculation by persons of small means and inadequate knowledge. The New York Cotton Exchange, therefore, refused to consent to the furnishing of its continuous quotations to appellant (R., pp. 21-22).

The appellant thereupon brought this suit.

This appeal presents three main questions: First: Does the contract between the Telegraph Company and the New York Cotton Exchange violate the Anti-Trust Laws? Second: Is there any other principle of law upon which appellant is entitled to the quotations? Third: Had the Court jurisdiction to entertain appellees' counterclaim?

POINT I.

This suit is not sustainable under the Federal Anti-Trust Laws.

It is not based on the act creating the Federal Trade Commission which provides as the only relief a proceeding before the Federal Trade Commission.

Nor is the suit—except as respects the remedy—based upon the Clayton Act, for the amended bill does not attempt to allege any offense or violation of law created by Sections 2, 3, 7 or 8 of that Act.

Section 16 of that Act does authorize a suit by an individual or corporation for injunctive relief in a Federal Court having jurisdiction of the parties against threatened loss or damage by a violation of the Sherman Act, although the Sherman Act itself sanctioned suits for injunction by the Attorney-General only. This suit, therefore, may not be sustained under the Federal Anti-Trust Laws unless the amended bill shows a violation of the Sherman Anti-Trust Act. That law provides (26 Stat. 209):

> "Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. * * *
>
> Section 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, * * * shall be deemed guilty of a misdemeanor * * *."

The amended bill alleges no act or conduct by any of the defendants, other than the execution of and compliance with the contract respecting the quotations of the

Cotton Exchange, that has any semblance to a contract in restraint of trade or to the monopoly of, or attempt to monopolize, any part of interstate commerce. Thus, as respects the Federal Statutes, the sole question here is, whether this *contract* can be construed as one in restraint of interstate commerce, or an attempt to monopolize any part of that commerce.

The Sherman Act, though an example of terse, lucid and comprehensive diction, necessarily used the most general terms in defining the kind of arrangements it sought to interdict. Thus it uses the phrases "in restraint of trade" and "an attempt to monopolize." The correct meaning of these phrases has been much discussed. Happily the controversy has been put at rest by the decisions of the Supreme Court in

> *Standard Oil Co.* v. *U. S.*, 221 U. S., 1 (1911);
> *U. S.* v. *American Tobacco Co.*, 221 U. S., 106 (1911),

establishing what has come to be known as "the rule of reason."

In the *Standard Oil* case the Court (at p. 58) construed the Sherman Act not as prohibiting acts "which did not unduly restrain interstate or foreign commerce" (at p. 60) but only "contracts or acts which were unreasonably restrictive of competitive conditions, either from the nature or character of the contract or act or where the surrounding circumstances were such as to justify the conclusion that they had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade", but rather "with the intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of commerce and tending to bring about the evils, such as enhancement of prices, which were considered to be against public policy".

The effect of that decision was "to leave it to be determined by the light of reason, guided by the principles of law and the duty to apply and enforce the public policy embodied in the statute, in every given case whether any particular act or contract was within the contemplation of the statute" (at p. 64).

The *American Tobacco* case, in reaffirming the *Standard Oil* case, held (p. 179) "that the statute did not forbid or restrain the power to make normal and usual contracts to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplish such purpose."

The following subsequent cases reinforce these views:

U. S. v. *Union Pacific R. R. Co.*, 226 U. S., 61 (1912);
U. S. v. *Reading Co.*, 226 U. S., 324 (1912);
Nash v. *U. S.*, 229 U. S., 373 (1913);
Eastern States Lumber Ass'n v. *U. S.*, 234 U. S., 600 (1914).

Earlier cases were to the same effect.

U. S. v. *Joint Traffic Ass'n*, 171 U. S., 505 (1898);
Hopkins v. *U. S.*, 171 U. S., 578 (1898);
Anderson v. *U. S.*, 171 U. S. 604 (1898).

In the *Joint Traffic Ass'n* case, this Court said, at page 568:

> "An agreement entered into for the purpose of promoting the legitimate business of an individual or corporation, with no purpose to thereby affect or restrain interstate commerce, and which does not directly restrain such commerce, is not, as we think, covered by the act, although the agreement may indirectly and remotely affect that commerce."

In the *Anderson* case, this Court, in sustaining a rule of an exchange, said, at page 615:

> "Where the subject-matter of the agreement does not directly relate to and act upon and embrace interstate commerce, and where the undisputed facts clearly show that the purpose of the agreement was not to regulate, obstruct or restrain that commerce, but that it was entered into with the object of properly and fairly regulating the transaction of the business in which the parties to the agreement were engaged, such agreement will be upheld as not within the statute, where it can be seen that the character and terms of the agreement are well calculated to attain the purpose for which it was formed, and where the effect of its formation and enforcement upon interstate trade or commerce is in any event but indirect and incidental, and not its purpose or object. * * * The same is true as to certain kinds of agreements entered into between persons engaged in the same business for the direct and *bona fide* purpose of properly and reasonably regulating the conduct of their business among themselves and with the public. If an agreement of that nature, while apt and proper for the purpose thus intended, should possibly, though only indirectly and unintentionally, affect interstate trade or commerce, in that event we think the agreement would be good."

The Court also held in the *Anderson* case that the effect on interstate commerce of the rule there in question was "too small to be taken into account (p. 619)." And in *Chicago Board of Trade* v. *U. S.*, 246 U. S., 231 [1918], the Court, in applying the principle of the foregoing cases, held that a rule of the Board of Trade which prohibited its members from bidding from 2 P. M. of one day until 9:30 A. M. on the next day for grain "to arrive" at other than a price fixed by the last trade on a call, was not a violation of the Sherman Act.

Thus the question here is whether the contract between the New York Cotton Exchange and the Telegraph Companies, which provides that the continuous quotations of that Exchange shall be given by the Telegraph Companies only to such persons as the Exchange shall approve, is either a contract in restraint of trade or an attempt to monopolize within the meaning of the Sherman Act.

Is that contract anything more than a normal method of accomplishing the purposes for which the Exchange was organized and a reasonable exercise of a legitimate function of the Exchange?

Is the prejudicial effect, if any, upon interstate commerce so direct and substantial as to come within the Sherman Act, or so indirect or incidental as to be "too small to be taken into account"?

The legal test being thus established—in determining, whether this contract is within the statute, all the facts and circumstances existing at the time of its enactment, as well as its effect, are to be taken into consideration.

> *Anderson* v. *U. S.*, 171 U. S., 604 (1898);
> *Continental Wall Paper Co.* v. *Voight & Sons Co.*, 212 U. S., 227, at 266 (1909);
> *U. S.* v. *St. Louis Terminal*, 224 U. S., 383, at 395 (1912).

In the *St. Louis Terminal* case, the Court held that it would not be determined, whether the combination violated the Sherman Act "without a consideration of natural conditions greatly affecting the railroad situation at St. Louis." (p. 395).

While, doubtless, a contract or act may be *per se* a violation of the statute—that is, so necessarily and directly a violation as to render the intention unimportant—still, in all cases presenting the question, whether

the act is anything more than a normal and usual method to further trade, the intention or purpose of the parties necessarily becomes a fact to be considered.

U. S. v. *Union Pacific R. R. Co.*, 226 U. S., 61 (1912);
U. S. v. *Reading Co.*, 226 U. S., 324, at 370 (1912);
U. S. v. *St. Louis Terminal*, 224 U. S., 383, at 395 (1912);
Swift v. *U. S.*, 196 U. S., 375, at 396 (1905).

In the *Union Pacific* case, *supra*, the Court said, at page 93:

> "In determining the validity of this combination we have a right to look also to the intent and purpose of those who conducted the transactions from which it arose and to the objects had in view."

The 16th and 17th paragraphs of the verified answer of the New York Cotton Exchange—which are not contradicted by any counter-affidavits, by the reply or by the affirmative allegations of the amended bill—as well as the contract itself (R., pp. 19-21, 23-36), show the intention and purpose of the parties in making the contract to have been a proper and legitimate one and remote from any design or purpose to restrain or monopolize interstate or other commerce. Prior to 1903, the Telegraph Companies were permitted, without any restriction, to gather these quotations in the Exchange Room, and to sell them to anyone desiring to purchase. Naturally, the only motive of the Telegraph Companies was profit, and the more customers, the more the profit. But this resulted in the creation of many bucket shops throughout the country, places where the quotations of a legitimate exchange are posted on a blackboard and the keeper of the bucket

shop accepts all offers of persons resorting to his place to bet on the fluctuations of prices as indicated by such quotations, these alleged trades or bets being opened at the last price on the blackboard and being closed when the blackboard price reaches a point where the customer's margins are exhausted, or where prior thereto the customer desires to close his trade at the last named price on the blackboard, the quotations being thus essential to the conduct of such business. The use by those institutions throughout the country of the quotations of this and other legitimate exchanges necessarily brought the New York Cotton Exchange and other regular exchanges into discredit in the minds of many people who ignorantly supposed, from the presence of these quotations, that these bucket shops were in some way connected with these exchanges. To suppress these gambling places, so far as they were operating on its quotations, the New York Cotton Exchange made a contract in 1903, requiring the Telegraph Companies—in order to acquire the quotations—to enter into a contract with this Exchange substantially in the form of the present contract. The obvious purpose of this contract was to confine the distribution of the quotations to those desiring them for lawful purposes, and to thereby exclude their being given to persons who would not carefully safeguard them and confine them to their own offices. To the success of this purpose, it was essential that the quotations should be kept, not only from the bucket shops themselves, but from all persons who should acquire them for the purpose of surreptitiously re-transmitting them to bucket shops. To this end, the contract provided for a written application to be signed by each person desiring the quotations, in which he should agree with the Exchange and the Telegraph Companies, not only that the applicant would not himself use the quotations in conducting a bucket shop, but that

he would confine the quotations to his own office and not permit them to be communicated therefrom (R., pp. 20-21, 27-28).

This plan to prevent the misuse of quotations necessarily imposed, either upon the Exchange or the distributing Telegraph Company, the burden of determining the character and purpose of each applicant for the quotations. The mere willingness of an applicant to sign the prescribed application in itself furnished no guaranty. The machinery adopted by the contract was the only feasible one. The Telegraph Company had no pecuniary interest in restricting the number of its customers for quotations. The only person having a real interest in preventing the misuse of the quotations was the Exchange itself, and the contract conferred upon the Exchange the right and duty to pass upon the character and purpose of each applicant and made its decision final by providing that the Telegraph Company should not furnish the quotations to anyone whose application had been disapproved by the Exchange (R., pp. 20-21, 27-28). But that this provision of the contract making the decision of the Exchange final upon each application had no other purpose or intent than to safeguard the quotations is shown by that provision of the contract which contemplates the distribution of quotations to others than those who "may be directly or indirectly engaged in the promotion or maintenance of bucket shops or other places where such continuous quotations are used as a basis for bets or other illegal contracts based upon fluctuations of the prices of cotton" (R., p. 26).

This contract does not undertake to fix the prices which the Telegraph Company must exact from those desiring the continuous or other quotations. It does fix the maximum price to be charged members of the Exchange, but does not prescribe minimum prices to anybody (R., p. 26). The contract is, therefore, not to be

condemned as within the principle established by the Supreme Court in

Bobbs-Merrill Co. v. *Straus,* 210 U. S., 339 (1908);
Dr. Miles Medical Co. v. *Park & Sons Co.,* 220 U. S., 373 (1911);
Bauer & Cie. v. *O'Donnell,* 229 U. S., 1 (1913);
Straus v. *Am. Publishers Ass'n,* 231 U. S., 222 (1913);
Straus v. *Victor Talking Machine Co.,* 243 U. S., 490 (1917);
Boston Store of Chicago v. *Am. Graphophone Co.,* 246 U. S., 8 (1918);
U. S. v. *A. Schrader's Son, Inc.,* 252 U. S., 85 (1920),

which prohibit agreements made by patentees or others with their purchasers under which the latter agreed to resell at the prices fixed by the former. These cases are reviewed in *Boston Store* v. *Am. Graphophone Co., supra.* The contracts condemned are those which aim to establish a price maintenance system and a permanent marketing price.

The contract in the case at bar has no such purpose. Applying to it "the rule of reason", neither the nature, nor the character of the contract, nor the circumstances surrounding it, justify the conclusion that it is entered into for the purpose of restraining trade or of creating a monopoly, or for any purpose other than that of properly and fairly regulating the transaction of the business for which the New York Cotton Exchange was organized and of preventing the misuse of its quotations. It is but a normal method of accomplishing a highly beneficial purpose—the prevention of the use of quotations in bucket shops. As such the contract is not within Section 1 of the Sherman Act as construed by the decisions of the Supreme Court already cited.

Nor can the contract be construed as an attempt to monopolize interstate commerce within the second section of the Sherman Anti-Trust Act.

The quotations of the New York Cotton Exchange, when collected and distributed under the restrictions prescribed by this contract, are property and belong exclusively to that Exchange.

> *Chicago Board of Trade* v. *Christie*, 198 U. S., 236 (1905);
> *Hunt* v. *New York Cotton Exchange*, 205 U. S., 322 (1907).

The contract provides (1) that the Exchange shall collect the quotations and give them to the Telegraph Company; (2) that the Telegraph Company shall take from each applicant an application in which he stipulates with that Company and the Exchange respecting the use of the quotations; (3) that such quotations are to be transmitted to the applicant only after the Exchange has had time to investigate, and has approved the application; and (4) that the Exchange may terminate the right of any person who receives the quotations, and that thereupon the Telegraph Company will cease to furnish the quotations to such person (R., pp. 24, 27-29, 30).

In other words, the Exchange determines to whom the quotations shall be given. It may at any time determine that they should be withdrawn from any person receiving them, and the Telegraph Company agrees to do this whenever requested by the Exchange. All of these provisions emphasize the purpose of the parties to be that the Exchange should retain control of the quotations and the right to withdraw them from anybody misusing them. In legal effect, this is a contract by which the Telegraph Company, as the carrier, agrees to transmit this news for the Exchange to certain persons to be designated by

it, and to accept from the Exchange as compensation for such service all that can be realized from the quotations in excess of $27,500 per year, the Telegraph Company guaranteeing that such distribution shall net the Exchange that sum (R., p. 32). In other words, under this contract, the Exchange is the real distributor of the quotations, and the Telegraph Company is an agency employed by the Exchange to facilitate such distributions. A similar contract was thus construed in

Matter of Renville, 46 App. Div., 37 (1899),

where Justice INGRAHAM said at page 43:

> "Under this agreement between the stock exchange and the respondents, certain information is given to the telegraph company to be communicated to individuals or corporations designated by the stock exchange. * * * The fact that the telegraph company pays to the stock exchange a certain sum of money for the information which it receives to transmit is also immaterial. The substance is that those to whom this information is directed to be given by the stock exchange are willing to pay the stock exchange for such information, and are also willing to pay the telegraph company the expense of transmitting the information. The information delivered to the respondents for transmission is a communication which the stock exchange wishes to transmit to the persons it designates and to no one else. I can see no reason why the stock exchange should be required to furnish the appellant with this information, which relates solely to its own business upon its own property, or why the respondents should be required to violate their agreement with the stock exchange and the law of this State, and furnish to the appellant information which had been communicated to the respondents by the stock exchange for a specific purpose and none other."

See also

Wilson v. *Commercial Telegram Co.*, 3 N. Y. Supp., 633 (1888);

Bryant v. *Western Union Tel. Co.*, 17 Fed. Rep., 825 (1883).

As the owner of the quotations, the Exchange is under no legal duty to sell it to any particular person nor is it under any legal obligation to sell to all because it sells to some. It has the legal right to determine to whom it will sell, and to require its agent (the Telegraph Company) which it employs to effect sales to carry out its purpose to select its purchasers, and, in exercising this right to select those to whom it will communicate the quotations, it does not attempt to monopolize or otherwise violate the Sherman Act or the general law. This is well shown in

Whitwell v. *Continental Tobacco Co.*, 125 Fed. Rep., 454 (1903),

where a corporation manufacturing tobacco, through its selling agent, refused to sell to those who desired to purchase, on terms that would be profitable to them, unless they refrained from dealing in the goods of the company's competitors, and this was claimed to violate the Sherman Act. But the Circuit Court of Appeals (8th Cir.) held otherwise, saying at page 461:

> "The tobacco company and its employe were not required, like competitors engaged in public or *quasi*-public service, to sell to all applicants who sought to buy, or to sell to all intending purchasers at the same prices. They had the right to select their customers, to sell and to refuse to sell to whomsoever they chose, and to fix different prices for sales of the same commodities to different persons."

As was said in

United States v. *Trans-Missouri Freight Association*, 166 U. S., 290, 320 (1897),

"The trader or manufacturer, on the other hand, carries on an entirely private business, and can sell to whom he pleases; * * *."

And as was said in,

Eastern States Lumber Association v. *United States*, 234 U. S., 600, 614 (1914),

"A retail dealer has the unquestioned right to stop dealing with a wholesaler for reasons sufficient to himself, and may do so because he thinks such dealer is acting unfairly in trying to undermine his trade."

And as was said in,

United States v. *Colgate & Co.*, 250 U. S., 300, 307 (1919),

"In the absence of any purpose to create or maintain a monopoly, the [Sherman] Act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell."

In *United States* v. *A. Schrader's Son, Inc.*, 252 U. S., 85 (1920), the Court re-affirmed *United States* v. *Colgate*, and again distinguished that case from its other decisions dealing with agreements attempting to fix permanent marketing prices. Supporting the same principle is the case of

Bitterman v. *Louisville & Nashville R. R. Company*, 207 U. S., 205, 222 (1907),

sustaining an injunction against the resale of non-transferable railroad tickets, and the recent decision of the Supreme Court in *Federal Trade Commission* v. *Curtis Publication Co.*, 260 U. S., 568 (1923), upholding a contract by a Philadelphia newspaper with its distributors which prevented them from distributing other newspapers.

But the question whether this contract is to be condemned as a restraint upon trade or an attempt at monopoly, either under the Sherman Act or the general law, is conclusively settled in the negative by the decision of this Court in *Board of Trade* v. *Christie Co.*, 198 U. S. 236 (1905). The contract in this record is substantially the same as the contract under consideration in that case, which was made by the Chicago Board of Trade with the Telegraph Companies for the distribution of its quotations. In a suit brought by the Board of Trade in the Federal Court of Kansas City, to prevent the purloining of those quotations, the defendants contended that the contract violated the Sherman Act, but the District Court held that it did not. (*Board of Trade* v. *Christie Co.*, 121 Fed., 608 (1903).) Upon an appeal of the case to this Court, the same contention was made and rejected in an opinion written by Justice Holmes who said, at page 252:

> "Finally it is urged that the contracts with the telegraph companies violate the act of July 2, 1890, c. 647, 26 Stat. 209. * * * But so far as these contracts limit the communication of what the plaintiff might have refrained from communicating to any one, there is no monopoly or attempt at monopoly, and no contract in restraint of trade, either under the statute or at common law. *Bement* v. *National Harrow Co.*, 186 U. S., 70; *Fowle* v. *Park*, 131 U. S., 88; *Elliman* v. *Carrington* (1901) 2 Ch. 275. It is argued that the true purpose is to exclude all persons who do not deal through members of the Board of Trade. Whether there is any-

> thing in the law to hinder these regulations being made with that intent we shall not consider, as we do not regard such a general scheme as shown by the contracts or proved."

This decision was subsequently approved in *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S., 373 (1911), where the Court condemned agreements aimed to establish permanent marketing prices, and distinguished the *Christie* case from the principle of the price-fixing cases.

The contract here thus being neither an attempt at monopoly nor a contract in restraint of trade, it remains to consider whether on any other principle of law, the plaintiff is entitled to the quotations belonging to the appellee. If so, it must be either:

(1) Because the quotations have become legally impressed with a "public use" to the extent that, if distributed at all, they must be distributed without discrimination, except to bucket shops; or

(2) Because the Exchange, by resorting to the telegraph companies—as, because of the nature of the property, it must do in order to sell at all—involuntarily impairs its property right to the extent of being obliged to sell it to those to whom it does not think it safe to entrust its quotations. In other words, the Exchange must suffer this impairment of its property in order to secure the services of common carriers to realize its value.

Upon this first question the Illinois Supreme Court has held in

> *New York, etc., Exchange* v. *Board of Trade*, 127 Ill., 153 (1889),

that, while the Chicago Board of Trade was under no legal obligation to furnish its quotations to the public, they had, because distributed unrestrictedly for a number of years, become so affected with a public use and so

subject to regulations by the courts, that, if distributed at all, they must be sold without discrimination to all who may desire them for lawful purposes, basing its decision upon *Munn* v. *People*, 94 U. S., 113 (1877). It was not, however, even suggested in that decision that the Board of Trade's right in its quotations was in any way impaired because public telegraph companies assisted in their distribution. But the Illinois Court here failed to notice that *Munn* v. *People*, involved only the validity of a *statute* fixing rates of storage in public elevators, which the Court upheld because a proper exercise of the police power.

On the contrary the following cases uphold the right of an Exchange—at least in the absence of affirmative legislation—to say to whom its quotations shall go, especially where, as in the case at bar, they are collected by the Exchange itself.

Board of Trade v. *Christie*, 116 Fed. Rep., 944 (1902);
Matter of Renville, 46 App. Div., 37 (1899);
Metropolitan Grain & Stock Exchange v. *Chicago Board of Trade*, 15 Fed. Rep., 847 (1883);
Bryant v. *Western Union Telegraph Co.*, 17 Fed. Rep., 825 (1883);
Marine Grain & Stock Exchange v. *Western Union Tel. Co.*, 22 Fed. Rep., 23 (1884);
Wilson v. *Commercial Tel. Co.*, 3 N. Y. Supp., 633 (1888).

In *Board of Trade* v. *Christie, supra*, Judge Hook said at page 946:

> "* * * * I am of the opinion that courts cannot by their decrees assume the initiative in declaring private property to be impressed with a public use. * * * The power to bring under government

> control the lawful business of individuals and private corporations not vested with the power of eminent domain, and who are not engaged in what, by common acceptation, is termed a public service, for the reason that such business, through the enterprise and prudent management of its conductors, has grown to be of great public interest and concern, is of the gravest and most momentous character. * * * When such a condition arises, the measure of the public control is limited by the extent of the public interest, and the making of regulations pertaining thereto is of the legislative, not judicial, cognizance."

In *Matter of Renville, supra,* the Appellate Division, First Department, said at page 43:

> "No statute requires a telegraph company to communicate to the public despatches which it has received from certain individuals to be transmitted to specified persons; * * *. I can see no reason why the stock exchange should be required to furnish the appellant with this information, which relates solely to its own business upon its own property, or why the respondents [telegraph companies] should be required to violate their agreement with the stock exchange and the law of this State, and furnish to the appellant information which had been communicated to the respondents by the stock exchange for a specific purpose and none other * * *.
>
> * * * But the question may well be asked, Where does the court get this power? No statute gives it. * * * and to grant such an application would, it seems to me, be an interference with the liberty of the individual which is protected by the constitution and the law."

That private property may be impressed with a public use only by legislative act has also been decided.

Express Cases, 117 U. S. 1 (1886);

A. T. & S. F. R. Co. v. *D. & N. O. R. Co.*, 110 U. S., 667, 682 (1884);
State v. *Associated Press*, 159 Mo. 410 (1901);
Ladd v. *S. C. P. & M. Co.*, 53 Tex., 172 (1880);
Del. L. & W. R. R. v. *Central Stock Yards Co.*, 45 N. J. Eq., 50 (1889);
Heim v. *N. Y. Stock Exchange*, 118 N. Y. Supp., 591 (1909).

In *Express Cases, supra,* where one express company claimed from a railroad company the same privileges it conferred on another express company, the Court said at page 29:

> "The regulation of matters of this kind is legislative in its character, not judicial. To what extent it must come, if it comes at all, from Congress, and to what extent it may come from the States, are questions we do not now undertake to decide; but that it must come, when it does come, from some source of legislative power, we do not doubt."

The Illinois Court, while apparently overlooking this principle in *New York, etc., Exchange* v. *Board of Trade*, 127 Ill., 153, *supra,* subsequently recognized it in

> *American Live Stock Commission Company* v. *Chicago Live Stock Exchange*, 143 Ill., 210 (1892),

where it rejected the contention that the Chicago Live Stock Exchange had, by reason of its magnitude and far-reaching influence upon the country, become impressed with a public use, saying (p. 238):

> "Ordinarily the adoption of new rules of public policy, or the application of existing rules to new subjects, is for the Legislature and not for the courts. Accordingly it may be held to be a

> general, though perhaps not an invariable rule, that the question whether a particular business which has hitherto been deemed to be private, is public and impressed with a public use, is for the Legislature. * * *
>
> Apart from the consideration that the extension and application of even existing rules of law to subjects not heretofore within their purview is legislative in its nature, the determination by the courts as to the precise point at which a mere private business reaches that stage of growth and expansion which is sufficient to render it *juris publici*, would be surrounded with very great difficulties, and would present questions for which the courts, unaided by legislation, would be able to find no just or satisfactory criterion or test."

There have been no statutes, state or federal, making these quotations open to all, and this for obvious reasons.

It is highly promotive of public welfare that the New York Cotton Exchange should assume the duty of safeguarding its quotations so as to suppress bucket shops. The only persons, other than bucket shops, requiring these continuous quotations are those who are engaged in the business of buying and selling cotton covered by them, and bankers who loan on such collateral. Among such persons it is the self interest of every exchange to give its quotations the widest possible distribution, as this increases the business of its members, which is one of the aims of every exchange.

What must be guarded against is the receipt of the quotations not only by bucket shops, but also by those who conduct a small broker's office or exchange, as a cloak, in order to get quotations to secretly transmit to bucket shops throughout the country. To establish by legal proof that such persons wish the quotations for that improper purpose is often very difficult. The Telegraph Company has not sufficient interest to assume this burden, and the few successful prosecutions of

bucket shops under the criminal laws prove that the government officials could not be expected to carry on the thorough investigations and prosecutions necessary to prevent the use of these quotations in bucket shops. Thus the States and Congress have wisely left to the exchanges the task of properly restricting the use of their quotations and have deemed the high character of these exchanges a sufficient guarantee against abuse or injustice in the dissemination of their quotations.

Do these quotations, not being impressed with a public use while in the possession of the Exchange, become thus open to all when given to the telegraph companies?

If the Exchange is the distributor of the quotations through the agency of the Telegraph Company, a negative answer would seem to be unavoidable; for any other rule would make the news of associations like the Associated Press, and even private messages, open to all, which is at variance with the decisions.

> *Matthews* v. *Associated Press*, 136 N. Y., 333 (1893);
> *State* v. *Associated Press*, 159 Mo., 410 (1901).

It is argued that by its contract with the exchange the Telegraph Company acquired by purchase an *unlimited* ownership in the quotations, and that being thus possessed in its public capacity the rule that common carriers must serve all alike applies to the distribution of quotations.

This position is erroneous because the Telegraph Company under this contract acquires, if any interest, only a restricted one—a right to sell to certain designated persons; and when it has done this its entire interest in the quotations is gone.

See

> *Bitterman* v. *L. & N. R. R.*, 207 U. S., 205 (1907), at 222.

Furthermore, if the Telegraph Company be adjudged the seller of these quotations, it is not, in delivering them to these designated persons, acting in its public capacity as a common carrier, but merely as a dealer in news, and it should not be required to give to others what it has not itself legally acquired. The Telegraph Company can only buy this news on the terms imposed by the Exchange, and the latter's right to impose such terms is expressly recognized in cases already cited.

Again the Telegraph Company, if the seller, is, as respects these quotations, within the principle that there are certain things a carrier may do, which are not subject to the rule—applicable to its service strictly as a common carrier—that all persons must be treated by it alike. Such things do not form a part of its public service, but are in the nature of accessories.

Thus a railroad company is not obliged to grant a person a right to construct an elevator upon its right of way, although it had already given others that privilege.

> *Missouri Pacific R. R.* v. *Nebraska*, 164 U. S., 403 (1896).

Nor is a railroad company obliged to allow all express companies to conduct an express business upon its road because it permits one to do so.

> *Express Cases*, 117 U. S., 1 (1886).

A railroad company may also allow one person to use its depot as a cab-stand, or to travel on its trains for the purpose of soliciting from incoming passengers the transportation of themselves or their baggage, without being under the obligation to grant the same privilege to others.

> *Donovan* v. *Penn. Company*, 199 U. S., 279 (1906);
> *Old Colony R. R.* v. *Tripp*, 147 Mass., 35 (1888);
> *Sargent* v. *Boston & Lowell R. R.*, 115 Mass., 416 (1874).

The Pullman Company, though a common carrier in its sleeping car service, is not such as respects its business of manufacturing cars. A state has no right to fix the price at which it should sell its cars. A railroad company when authorized to mine coal for sale is not a common carrier as respects its coal business.

So, a telegraph company, although a common carrier, as respects the transmission of messages for hire, is not such in its purchase and sale of news.

> *Bradley* v. *W. U. Telegraph Co.*, 8 Ohio Dec. Reprint, 707 (1883);
> *Sterrett* v. *Telegraph Co.*, 18 Weekly Notes of Cas. (Penn.), 77 (1886).

The *Bradley* case involved the distribution of the quotations of the Chicago Board of Trade, and arose before the making of the contract involved in *New York, etc., Exchange* v. *Board of Trade*, 127 Ill., 153, and while the telegraph company, through its employees, was collecting this news on the floor of the exchange; and the Court (Judge MAXWELL), in denying an injunction against the telegraph company, the only defendant, said:

> "This business of collecting and furnishing 'commercial news' is entirely separate and distinct from the business of the defendant as a common carrier of messages for hire from one person to another, over its wires, and I cannot see that it differs in its nature from the business of any of our merchants who purchase goods and merchandise, in the east and elsewhere, and bring them here to dispose of to their customers. * * * The law of bailment is the foundation of the law governing common carriers, and the ordinary definition of bailment is, a delivery of something of a personal nature by one to another upon a contract, express or implied, that that other will dispose of the thing according to the instructions given him. * * * But in this case, the quotations collected by the defend-

ant are its own property until delivered into the possession of the plaintiff and are not in any sense the subject of a bailment. I am not aware of any adjudicated cases on the subject, but it seems to me clear on principle, that in collecting and furnishing the quotations which are the subject of this controversy, the defendant was engaging in a business entirely distinct from its public duties." (p. 708).

See also

Chesapeake and Potomac Tel. Co. v. *Manning*, 186 U. S., 238, 247 (1902).

It follows, therefore, that there is no legal theory upon which plaintiff is entitled to an injunction.

POINT II.

The transactions on which the amended bill is based do not involve interstate commerce.

Appellant seeks a mandatory injunction directing appellees to supply to it the continuous quotations of prices of cotton sold on contracts for future delivery made on the New York Cotton Exchange.

A. Such contracts are made in the board room of the Exchange and provide that the cotton is "deliverable from licensed warehouses in the port of New York." Performance of the contract in the month when the cotton is deliverable must be made by the delivery of negotiable warehouse receipts issued by licensed warehouses in the port of New York (R., p. 16). There is no obligation to make delivery at any place except in that

port. The fact that at some time before delivery the cotton must be brought from one of the cotton growing states does not affect the obligation imposed by the contract, which may be, and probably almost always is, performed by the seller obtaining for delivery warehouse receipts representing cotton already stored in a licensed warehouse within the port of New York. The fact that cotton may be in a warehouse in New Jersey does not alter this situation for the locality of the performance is to be judged by the obligation it imposes; and that obligation may be discharged by a warehouse receipt representing cotton in the City of New York.

Clearly this transaction is local in its character and does not involve interstate commerce.

In *Hopkins* v. *United States*, 171 U. S., 578 (1898), members of the Kansas City Livestock Exchange received consignments of cattle from owners in other states upon an arrangement that they should be sold and the net amount realized on the sale returned to the owners. Money was advanced on the cattle to induce owners to ship them to the Kansas City market. The Court held that the transaction did not involve interstate commerce, saying at page 588:

> "Where the stock came from or where it may ultimately go after a sale or purchase, procured through the services of one of the defendants at the Kansas City stock yards, is not the substantial factor in the case. The character of the business of defendants must, in this case, be determined by the facts occurring at that city."

And at page 590:

> "The selling of an article at its destination, which has been sent from another State, while, it may be regarded as an interstate sale and one which the importer was entitled to make, yet the services of the individual employed at the place

> where the article is sold are not so connected with the subject sold as to make them a portion of interstate commerce, and a combination in regard to the amount to be charged for such service is not, therefore, a combination in restraint of that trade or commerce."

The Court used for illustration the case of a transaction on the New Orleans Cotton Exchange similar to transactions on the New York Cotton Exchange, and said at page 598:

> "Is a New Orleans cotton broker who is a member of the Cotton Exchange of that city, and who receives consignments of cotton from different States and sells them on 'change in New Orleans and accounts to his consignors for the proceeds of such sales less his commission, engaged in interstate commerce? * * * We think it would be an entirely novel view of the situation if all the members of these different exchanges throughout the country were to be regarded as engaged in interstate commerce, because they sell things for their principals which come from States different from the one in which the exchange is situated and the sale made."

There was a similar decision in *Anderson* v. *United States,* 171 U. S., 604 (1898), where it appeared that the defendants, instead of acting on commission, were themselves the actual purchasers of the cattle, but the Court held that the effect of the transactions on interstate Commerce was only indirect. While the refusal of the defendants to do business with commission men, selling to or purchasing from yard traders who were not members of the Exchange, might have an effect upon interstate commerce, the effect was "quite remote, not intended and too small to be taken into account" especially as the Exchange itself did not "meddle with prices" or do any business.

In *Ware and Leland* v. *Mobile County*, 209 U. S., 405 (1908), it was held that a state tax upon persons engaged in buying and selling cotton for future delivery was not a regulation of interstate commerce because such sales did not involve such commerce. Judge DAY said that, even though orders were transmitted from other states, the property was bought within the state and there held for the purchaser. He added, at page 413:

> "The transaction was thus closed by a contract completed and executed in the foreign State, although the orders were received from another State. When the delivery was upon a contract of sale made by the broker, the seller was at liberty to acquire the cotton in the market where the delivery was required or elsewhere. He did not contract to ship it from one State to the place of delivery in another State. And though it is stipulated that shipments were made from Alabama to the foreign State in some instances, that was not because of any contractual obligation so to do."

To the same effect is *Hill* v. *Wallace*, 259 U. S., 44 (1922),

The principle of the foregoing cases establishes not only that the contracts made on the New York Cotton Exchange do not involve interstate commerce, but also that the transactions upon the board of the appellant, as described in the amended bill of complaint, do not involve interstate commerce, for they are alleged to be essentially of the same character as those of the New York Cotton Exchange (R., pp. 2, 14).

B. The question remains whether the transmission of continuous quotations representing sales on the New York Cotton Exchange themselves so affect interstate transactions as to be a subject for regulation by the Federal Government. If sales made in one state are not of an interstate character even when they are expressly

based upon contemplated shipments from other states, as in the *Hopkins* and *Anderson* cases, and inducements are extended to owners to make such shipments, mere information concerning the prices at which such sales are made, communicated wholly within this State, cannot reasonably be said to affect directly interstate commerce. Continuous quotations giving information as to prices are like the services of commission merchants in the *Hopkins* case, merely "an aid or facility to commerce and which if it affect interstate commerce at all, does so only in an indirect and incidental manner." In that case it was held that correspondence relating to the sale was merely a local "aid or facility", collateral to the commerce itself. And even such incidents of sales as the loaning of money to encourage them and combinations among the brokers as to the amount of selling charges, were likewise held to be mere incidents not having a direct effect to limit competition in trade between States.

A feature of the transaction dealt with by the Court in the *Hopkins* case has a striking similarity to the facts in the case at bar. There was an agreement among the defendants to abstain from telegraphing in regard to their business in certain contingencies, and the Court said that this was not

> "a direct attempt to affect the business of the telegraph company, and has no direct effect thereon. Although communication by telegraph may be commerce, and if carried on between different States may be commerce among the several States, yet an agreement or by-law of the nature of the one under consideration is not a burden or a regulation of or a duty laid upon the telegraph company, and was clearly not entered into for the purpose of affecting in the slightest degree the company itself or its transaction of interstate commerce" (171 U. S., at p. 599).

In *Hill* v. *Wallace*, the doctrine was affirmed that sales for future delivery were not "in and of themselves interstate commerce", yet Congress had power to regulate them if it should conclude that because there were "exorbitant charges, dishonest practices and collusion", the failure to regulate was likely "to impose a direct burden on interstate commerce." But we have no such case here.

The object of protecting continuous quotations is (1) to prevent their wrongful use for bucket shops, and (2) to protect the Exchange by preventing the theft of its property rights (R., pp. 18, 20). Such purposes as these, either from the moral or the legal standpoint, are entirely proper, and there is no element of exorbitant charge or dishonesty or collusion or illegality making them a suitable subject for regulation because of their effect on interstate commerce. That applicants for ticker service must receive the approval of the New York Cotton Exchange gives an advantage to that Exchange and to those whose applications it approves, but that is an incident of ownership similar to the right that any man has to select the person to whom to sell his property. In *Board of Trade* v. *Christie Grain & Stock Co.*, 198 U. S., 236 (1905), it was claimed that the contracts between the telegraph companies and the Chicago Board of Trade, similar to the contract in the case at bar, were in violation of the Anti-Trust Law, but Justice Holmes, in delivering the opinion of the Court, said at page 252:

> "But so far as these contracts limit the communication of what the plaintiff might have refrained from communicating to anyone, there is no monopoly or attempt at monopoly, and no contract in restraint of trade, either under the statute or at common law."

Clearly, the failure of the New York Cotton Exchange and the Telegraph Company to give to the appellant con-

tinuous quotations, does not directly affect interstate commerce, and has not, therefore, been regulated by the Anti-Trust Laws.

POINT III.

The Circuit Court of Appeals had jurisdiction to entertain appellees' counterclaim and to grant a final injunction thereon.

The appellant, by its Tenth, Eleventh and Twelfth Assignments of Error, has raised the following objection to the jurisdiction of the court to entertain the counterclaim:

1. That the court having dismissed the amended bill of complaint because the acts complained of were not a violation of the Anti-Trust Law, should have dismissed the counterclaim since there was no diversity of citizenship between the parties.

2. That the court erred in holding that the amended bill of complaint and the counterclaim related to the same subject matter and that there need not be jurisdiction of the counterclaim independently of the amended bill.

3. That the court having determined that the facts set forth in the amended bill of complaint failed to show federal jurisdiction thereupon lost further jurisdiction over the subject matter and in ordering the dismissal of the amended bill of complaint should have dismissed the counterclaim (R., p. 73).

Appellant argued before the Circuit Court of Appeals that the order, granting a preliminary injunction to appellees enjoining appellant from receiving or using the continuous quotations of the New York Cotton Exchange, should be reversed because the Court did not have juris-

diction to entertain the counterclaim: (1) because there was no diversity of citizenship between the parties; (2) because the counterclaim does not arise out of the same transaction which is the subject matter of the amended bill.

In granting the preliminary injunction Judge Hand disposed of this argument by holding that the Court had jurisdiction to entertain the counterclaim because it was ancillary to the main controversy presented by the bill and "necessary to a complete disposition of the subject matter of the bill and to the protection of the rights involved" and because "a decree under the counterclaim would do no more than secure to the defendant the complete enjoyment of a decree on the bill" in appellees' favor (R., pp. 50-51).

The Circuit Court of Appeals affirmed the order made by Judge Hand denying appellant's motion for a preliminary injunction and granting to appellees a preliminary injunction on their counterclaims enjoining appellant from receiving or using the continuous quotations of the appellee New York Cotton Exchange, and it dismissed the amended bill of complaint on the ground that the contract between the New York Cotton Exchange and the Telegraph Companies was not entered into for the purpose of restraining trade or creating a monopoly. The Court said:

> "It cannot be said that the contract involved was entered into for the purpose of restraining trade or creating a monopoly. It appears to us that its purpose was that of properly regulating the transaction of the New York Cotton Exchange and of preventing the misuse of its quotations. It is not a contract in restraint of trade or commerce within the meaning of Section 1 of the Sherman Act as construed by the Supreme Court. Neither is it an attempt to monopolize trade or commerce among the several States within the meaning of Section 2 of the Sherman Act" (R., p. 64).

The Court also held that the New York Cotton Exchange was not engaged in interstate commerce, saying:

> "The contracts made on the New York Cotton Exchange are made in the Board Room of the Exchange in the City of New York and they provide that the cotton is deliverable from licensed warehouses in the Port of New York. Performance of the contract is made by the delivery of negotiable warehouse receipts issued by licensed warehouses in New York. There is no obligation to make delivery at any place except in the Port of New York. Such a transaction is local in its character and does not involve interstate commerce. The decisions of the Supreme Court make this clear" (R., p. 65).

Having thus after a careful analysis of the contract governing the distribution of the quotations and the acts performed by the New York Cotton Exchange come to the conclusion that there was no restraint of trade or monopoly the Court dismissed the amended bill of complaint but granted relief on the counterclaim, saying:

> "While the court was without jurisdiction to grant the relief which the complainant sought because the facts stated in its bill did not constitute a restraint of interstate commerce as alleged it necessarily had jurisdiction to determine the question at issue between the parties. As it acquired jurisdiction for that purpose it acquired jurisdiction of the counterclaim as its subject matter was related to and connected with the matters in the original bill, those matters being the future quotations of the Exchange and the contract restricting their distribution" (R., pp. 67-68).

After the Court had rendered this decision and in order that there might be a complete disposition of the case by a decree final as to the relief on the counterclaims as well as to the dismissal of the amended bill the parties

stipulated that the affidavits used by appellees in support of their motion for a preliminary injunction should "have the force and effect of testimony in support of the counterclaims" offered at the trial and that the Circuit Court of Appeals might direct such final judgment on the counterclaims as in its opinion should be entered. That Court pursuant to this stipulation then entered its decree awarding a final injunction to defendants (R., p. 70).

The subject matter of the amended bill and the counterclaim is the same.

Both the amended bill and the counterclaim relate to the same subject matter—the use in the future of the continuous quotations of the New York Cotton Exchange. The bill seeks a mandatory injunction to obtain them, alleging that the refusal of the appellees to furnish them is wrongful because in pursuance of a contract to suppress competition and a step in a scheme to monopolize the business of dealing in cotton. The appellant claims that the contract between the appellees, in so far as it interferes with his demand for the quotations, is illegal under the Anti-Trust Laws of the United States and on this ground invokes the aid of a Federal Court. The appellees admit the refusal to furnish the quotations, but deny that it is a part of a scheme to monopolize or suppress competition and assert the validity of the contract and the right of the New York Cotton Exchange to withhold its quotations from appellant. The appellees have been successful, the Court has held that the contract is valid and that appellees have the right to withhold the quotations from appellant and that appellant has no right to demand them. The counterclaim asks that this right of appellees to withhold the quotations be protected from appellant by forbidding him to purloin them.

We submit that the injunctive relief demanded by appellees in the counterclaim is ancillary to a complete

disposition of the controversy thus presented by the bill.

The appellees plead that they have the right to refuse the quotations and ask that their enjoyment of this right be protected by injunction against unlawful interference by appellant. Appellees have established this right and the decree forbids its impairment by appellant, as prayed in the counterclaim. Thus they only secure the complete enjoyment of their rights established by the decree. This result is clearly ancillary to a complete disposition of the original controversy.

One of the earliest principles of equity jurisprudence is

> "that where a court of equity has obtained jurisdiction over some portion or feature of a controversy, it may, and will in general, proceed to decide the whole issues, and to award complete relief" (Pomeroy Equity Jurisprudence, 3rd Ed., Sec. 231).

See also

> *Pierce* v. *New York Dock Co.*, 265 Fed. Rep. 148, 158 (1920);
> *McGowan* v. *Parish*, 237 U. S. 285, 296 (1915).

It, of course, became necessary that equity pleadings and practice should aid in the application of this maxim. Here, doubtless, will be found the origin of the cross-bill of equity practice.

It could not be expected that the complainant's bill would assert more than his claim or side of the case. The answer was logically confined to matter of a defensive character. Sometimes, at least, an answer, properly limited, would not disclose all the facts on which the defendant claimed to be entitled to relief against the complainant or upon which the court could award complete relief; nor was a prayer for relief against the complainant a proper part of the answer. Thus arose the neces-

sity for a cross-bill. Some limitation had to be placed upon the right of the defendant to inject into the plaintiff's suit a controversy in which defendant sought relief. Otherwise there might be brought into complainant's suit by a cross-bill claims, wholly unrelated to the matter involved in complainant's bill, resulting in an undue enlargement and prolongation of litigation and constant confusion of the issues. It was, therefore, found necessary to limit the scope of the cross-bill to claims relating to the subject matter involved in the original bill. This then became the doctrine of English equity practice which at first limited the defendant in his cross-bill to the assertion of claims "touching the matters in question in the original bill" (Mitford's Equity Pleading, by Jeremy, 80, 81). But the purpose of the cross-bill was "to procure a complete determination of a matter already in litigation" (2 Daniell's Chan. Pr., *1549).

Atlanta Mills v. *Mason*, 120 Mass., 244 (1876), presents an illustration of the proper use of a cross-bill strikingly analogous to the counterclaim in the case at bar. The complainant, a mill owner, sought to prevent the maintenance of a dam at an excessive height by an owner of property lower down the stream. Defendant filed a cross-bill to restrain a diversion of the water by complainant, and it was held that this was a proper subject of a cross-bill because defendant's grievances "relate to the subject matter presented by plaintiff's bill, namely, the rights of the respective parties in the use of a stream which furnishes the power for each privilege * * *" (p. 250).

Even in the absence of other grounds of Federal jurisdiction a suit can be maintained in a Federal court if it is ancillary to another suit of which that court has jurisdiction and is brought to protect rights adjudicated by the Court in reference to the subject matter of the

original suit and to render effectual rights adjudicated therein.

Raphael v. *Trask*, 194 U. S., 272, 278 (1904); *Stillman* v. *Combe*, 197 U. S., 436 (1905).

Where the bill presents a Federal question sufficient to sustain jurisdiction, the Court has "the right to decide all the questions in the case, even though it decided the Federal questions adversely to the party raising them, or even if it omitted to decide them at all, but decided the case on local or state questions only." *Siler* v. *Louisville & Nashville R. R. Co.*, 213 U. S., 175, 191 (1909).

See also

Geddes v. *Anaconda Copper Mining Co.*, 254 U. S., 590 (1921).

The courts have also repeatedly held that cross-bills, now called counterclaims, may be maintained, even in the absence of independent Federal grounds of jurisdiction, if ancillary to the main controversy presented by the bill or necessary to a complete disposition of the subject matter of the bill and to the protection of the rights involved.

In *Kingsbury* v. *Buckner*, 134 U. S., 650, 676 (1890), a bill was filed to enforce a contract. Defendant interposed a cross-bill to annul the contract on the ground of fraud, or to reform it on the ground of mistake. The Court held that the matter in question in the original suit was the contract; that the cross-bill related to the same matter, and that, although it was true that the cross-bill alleged additional facts, "its subject matter was not the less, for that reason, germane to the original bill." In such a case, a fraud in the contract could be relied upon wholly as a defense, and the presence of the cross-bill does not enlarge the evidence. Its only utility is to enlarge the

decree so as to give the defendant more fully the benefit of it, if successful. It touches the matter in question in the original suit.

The bill in the case at bar is the converse of the foregoing. It seeks to annul the contract between the Telegraph companies and the Exchange, to impose upon the Telegraph companies the duty to serve all alike, and thus to obtain the quotations. The counterclaim asserts the validity of the contract, and seeks, if the Court sustains its validity, to secure the full benefit of that decision and of the contract against the plaintiff, whose conduct is nullifying it. Clearly the subject matter and "matters in question" in the original bill are the future quotations and the contract restricting their distribution; and the only purpose of the counterclaim is to obtain for the Cotton Exchange the full benefit of a decision upholding the contract. It seeks only to put the Court in a position to administer complete relief in this suit, instead of compelling the appellees to resort to another suit. The counterclaim does not bring in any new "subject matter." It relates to the same contract and to the same future quotations which the appellant seeks to obtain by having that contract declared illegal. The counterclaim does not enlarge the allegations of the answer, and hence, does not increase the proof required. The appellee, the Cotton Exchange, as part of its answer, alleges that the Odd-Lot Exchange is already purloining these quotations and it claims that because of this fact (1) The Odd-Lot Exchange did not come into court with clean hands; and (2) The Cotton Exchange was justified in refusing its application for the quotations, because the Odd-Lot Exchange was receiving them and distributing them, and that such use of them would impair their value and defeat the Cotton Exchange's efforts to prevent their getting into the hands of bucket shops. It, therefore, appears that the receipt and use of these quotations was

made by the answer an issue in appellant's case, both as a defense to justify the refusal to furnish appellant with the quotations and as a counterclaim to prevent his surreptitiously obtaining them; and for the latter purpose, no evidence is required additional to that which would have to be interposed to sustain the defense. The only matter in the counterclaim that is not already properly in the answer is the prayer for affirmative relief.

Surely under these circumstances, the court, after deciding all the issues in the case, is empowered to enter a decree enjoining the appellant.

In *Hogg* v. *Hoag*, 107 Fed. Rep., 807 (1901) (S. D. N. Y., aff'd 154 Fed. Rep. 1003), Judge WALLACE held that, in a suit to secure the appointment of a new trustee in the place of one who had died, a cross-bill by beneficiaries demanding an accounting was proper, although it could not have been sustained as an original bill for lack of jurisdiction because there was no diversity of citizenship between the parties. The Court decided that the cross-bill could be maintained "As auxiliary to and dependent upon the original suit, such a bill is a proceeding to procure the complete determination of the matter already in litigation" (p. 814).

In *Osborne & Co.* v. *Barge and Others*, 30 Fed. Rep., 805 (1887), Judge SHIRAS held that where a Circuit Court of the United States had jurisdiction of a suit to foreclose a chattel mortgage, it might entertain a cross-bill therein filed by an intervenor, claiming to be owner of a part of the property, although, because his citizenship was the same as that of the defendant, the intervenor could not have originated the suit, saying at page 806:

> "As already stated, the jurisdiction of the cause of action presented by the original bill, and of the parties thereto, cannot be and is not questioned. Having acquired full and complete jurisdiction of the original cause, and the parties thereto, the court cannot be deprived thereof because

> another party obtains leave to intervene for the assertion of a right to the property which is the subject of the proceeding. If it be necessary for the protection of the rights of a third party that he be heard in the cause pending, he may be permitted to intervene, even though the court would not have, by reason of his being a citizen of the same state with complainant, jurisdiction over an original proceeding between the same parties. *Freeman* v. *Howe*, 24 How., 450; *Krippendorf* v. *Hyde*, 110 U. S., 276, 4 Sup. Ct. Rep., 27; *Phelps* v. *Oaks*, 117 U. S., 236, 6 Sup. Ct., Rep. 714."

In *First Natl. Bank of Salem* v. *Salem Capital Flour Mills Co., et al.*, 31 Fed. Rep. 580 (1887), one of the defendants filed a cross-bill against the plaintiff and his co-defendants. The objection was raised that the cross-bill could not be maintained because the citizenship of the defendants was the same. The Court said at page 583:

> "An attempt is also made to show that this cross-bill cannot be maintained on account of the citizenship of the parties thereto, because it makes a case or states a controversy between Stuart on the one hand and McDonald and the flour mills company on the other, all of whom are British subjects.
>
> "Now, nothing is better settled, both on reason and authority, than this. In suits not original but ancillary to litigation already pending in a circuit court of the United States, the citizenship of the parties is wholly immaterial. *Shields* v. *Barrow*, 17 How., 130; *Freeman* v. *Howe*, 24 How., 460; *Cross* v. *De Valle*, 1 Wall., 14; *Railroad Cos.* v. *Chamberlain*, 6 Wall., 748.
>
> "In the last case the court reversed the decree of the circuit court dismissing the cross-bill on the final hearing, because the parties thereto were citizens of the same state; saying that the cross-bill 'was but ancillary to, and dependent upon, the original suit,' and, by a necessary implication, that

the citizenship of the parties in this connection was immaterial. If the citizenship of the parties in the original suit is sufficient to give the court jurisdiction, it has jurisdiction of the cross-bill therein without reference to the citizenship of the parties thereto. A cross-bill is a proper and recognized means of making a defense or asserting the right of a defendant in a suit in equity. It would be intolerable if a party, sued in a national court, was thereby deprived of this right, unless the parties to the cross-bill were such as to give the court jurisdiction in an original suit. In short, the cross-bill and the original suit are but one cause, and jurisdiction of the latter includes the former. *Field* v. *Schieffelin*, 7 Johns., Ch. 252; Story, Eq. Pl., §399."

The foregoing cases were decided prior to the adoption of equity rule No. 30 providing:

> "The answer must state in short and simple form any counter-claim arising out of the transaction which is the subject-matter of the suit, and may, without cross-bill, set up any set-off or counter-claim against the plaintiff which might be the subject of an independent suit in equity against him, and such set-off or counter-claim, so set up, shall have the same effect as a cross-suit, so as to enable the court to pronounce a final decree in the same suit both on the original and cross-claims."

Since the adoption of this rule the courts have adhered to their former ruling that, if the bill showed ground of federal jurisdiction, they would entertain a counter-claim relating to the subject-matter of the bill, or necessary to complete disposition of the subject-matter and to the protection of the rights involved, although the counter-claim did not disclose grounds of federal jurisdiction.

In *Cleveland Engineering Co.* v. *Galion Dynamic Motor Truck Co.*, 243 Fed. Rep., 405 (1917), the complainant and defendant were both residents of the same state. The complainant brought a suit for patent infringement. The defendant interposed a counter-claim alleging equitable ownership of the patent and asking for a decree to quiet its title. Complainant moved to strike out the counter-claim on the ground that the Court had not jurisdiction because complainant and defendant were citizens of the same state and because the subject-matter of the counter-claim did not disclose any independent ground of federal jurisdiction, but the Court denied the motion, saying at page 407 that a determination of the counterclaim

> "is necessary in order that complete relief may be given concerning the subject-matter put in litigation by complainant's bill. It is such matter as, according to familiar equity rules, might be made the subject of a cross-bill, and the necessity for pleading same as a counter-claim or cross-bill is in order that complainant may not only be defeated, but that complete relief may be given.
>
> "Manifestly, as a defense, the defendant may deny complainant's title to either or both of the patents sued on; it may, on the hearing, show title in some third party to either or both as a defense; it may also show title in itself to either or both as a defense. In any of these contingencies, complainant's bill should be dismissed. No new or additional evidence in the contingency last assigned would be required to warrant a decree in favor of defendant, pursuant to its cross-bill. It would seem little short of absurd if a court of equity had not power to give complete relief in that event by decreeing that defendant's equitable title should be quieted against complainant's false claim, and that the legal title should be conveyed to it.
>
> "The jurisdiction of this court to entertain the counter-claim depends on the case made by complainant's bill. The bill states a case within the

jurisdiction of the federal court, arising under the patent laws. That jurisdiction is not ousted, or does not fail, because the defendant brings forward a matter of defense arising out of contract, and not within the original jurisdiction of this court. If jurisdiction has attached on the allegations of the bill, this court may proceed to try all questions between the parties, touching that subject-matter, and grant full relief to both parties, even though, on the hearing, the issues touching matters of proper federal jurisdiction are held in fact not to exist, or are decided adversely to complainant's contention."

And also at page 409:

"The counterclaim touches only the matters in question in the original bill; the relief prayed for therein is necessary to a complete determination of the controversy between the parties relating to that subject-matter. The counterclaim does not, in any proper sense, introduce new and distinct matters into the litigation which were not embraced within the original bill. The subject matter is the same, and the only necessity of a prayer for affirmative relief is to enable a decree to be entered in favor of defendant if the defense is made good."

In *Portland Wood Pipe Company* v. *Slick Bros. Const. Co.*, 222 Fed. Rep., 528 (1915), it was held that in a suit by a non-resident of the district to foreclose a mechanics' lien in which the contractor and a sub-contractor, resident citizens of the district, had been made defendants and the sub-contractor asserted a lien upon the property, the Court has jurisdiction to entertain a counterclaim by the contractor against the sub-contractor for moneys advanced and supplies furnished during the progress of the work under the rule that where the Court has jurisdiction of the controversy exhibited by the complaint it may assume jurisdiction to adjudicate incidental issues

raised by cross bills between the defendants regardless of citizenship. The Court said, at page 530:

> "It becomes manifest that the reason which underlies the rule above referred to, by which auxiliary proceedings fall within the jurisdiction of the court regardless of the citizenship of the parties thereto, operates in like manner to extend our jurisdiction to this counterclaim. This rule was established to avoid the necessity of attempting to administer justice by litigating controversies piecemeal, and the reasons for here taking cognizance of Comerford's cross-bill in the absence of diversity of citizenship between the parties are not greater than or different from the reasons for taking cognizance of Slick Bros.' counterclaim interposed in the answer thereto. It is essential to the complete settlement of the controversy initiated by the commencement of the principal suit that we adjudicate both."

The cases cited by appellant, such as *U. S. E. Bolt Co.* v. *Kroncke Hardware Co.*, 234 Fed. Rep., 868 (1916); *Standard Paint Company* v. *Trinidad Asphalt Company*, 220 U. S., 446 (1911); *Geneva Furniture Mfg. Company* v. *Karpen & Co.*, 238 U. S. 254 (1915), are not apposite. In most of these cases the question was whether causes of action for infringement of copyright or trade mark were distinct from a cause of action for unfair competition. We admit that there are essential differences between such causes of action and that they are not related. In no legitimate sense could it be claimed that relief for unfair competition is incidental for relief for patent infringement, but such an admission does not cover the case at bar, in which we claim that relief by injunction against appellant's misuse of our quotations is incidental to the future use of the continuous quotations of New York Cotton Exchange.

POINT IV.

There was sufficient proof to sustain the allegations of appellees' counterclaim that appellant was receiving and using appellees' continuous quotations.

Appellant assigns as error on this appeal:

> "The Court erred in directing the District Court to render a judgment and decree of final injunction in favor of defendants against complainants on the counterclaim, because the allegations of the counterclaim and the evidence in support thereof are wholly insufficient" (R., pp. 73-74, Fifteenth Assignment of Error).

The allegations in the counterclaim that appellant was either purloining the quotations or receiving them from someone who was purloining them are made on information and belief, but the affidavits of Hall, Burmeister, Hale and Irving printed at pages 41-44 of the Record are made on knowledge and show beyond question the facts detailed below.

On February 5th, 1923, appellant was posting on its blackboard the quotations of the New York Cotton Exchange. Members of the appellant Exchange also told Burmeister on this day that appellant was obtaining these quotations (Burmeister, R., pp. 43-44).

The affidavit of Mr. Hale, secretary of the New York Cotton Exchange, corroborates Burmeister's statement that the quotations which he copied from appellant's blackboard were the quotations of the New York Cotton Exchange (R., p. 42).

The affidavits of Irving and Hall show that the telegraph companies are not furnishing these quotations to appellant (R., pp. 41-42).

Paragraph twenty-first of the answer and counterclaim of the New York Cotton Exchange and Paragraph

Eleventh of the answer and counterclaim of the Telegraph Companies charge that appellant is either purloining these quotations or receiving them from some one who is purloining them (R., pp. 22, 38-39).

Appellant in its reply denies that it is purloining the quotations but does not deny in any affidavit or pleading that it is receiving them and in fact claims that they are public property (R., pp. 46-47).

On similar proof injunctions were granted restraining the use of similar quotations in *Board of Trade* v. *McDearmott Commission Co.*, 143 Fed. Rep., 188, 190 (Circ. Ct. W. D. Mo., 1906); *McDermott Commission Co.* v. *Board of Trade*, 146 Fed. Rep., 961, 962 (C. C. A., 8th Circ. 1906); *Board of Trade of Chicago* v. *Hadden-Krull Co.*, 109 Fed. Rep., 705 (Circ. Ct. E. D. Wis., 1901); *Board of Trade* v. *Cella Commission Co.*, 145 Fed. Rep., 28 (C. C. A., 8th Circ. 1906); *Board of Trade* v. *Price*, 213 Fed. Rep., 336 (C. C. A., 8th Circ. 1914); *Board of Trade* v. *Christie Grain & Stock Co.*, 198 U. S., 236, 1905.

The stipulation that the affidavits of Hall, Irving, Hale and Burmeister should have "the force and effect of testimony in support of the counterclaims" and that the Circuit Court of Appeals "might direct the entry of such final judgment on the counterclaims as in its opinion the court below should enter thereon" (R., p. 70) was made to enable the Circuit Court of Appeals to treat these affidavits for the purpose of entering final judgment thereon as if the affidavits had been testimony on a trial of the counterclaims, and thus to make a final decree disposing of the whole case. This the Circuit Court of Appeals had the power to do in view of the Stipulation.

Thomsen v. *Cayser*, 243 U. S., 66 (1917).

POINT V.

Replying to arguments in appellant's brief.

(a) *The Circuit Court of Appeals had the right to regard the whole record before it in finally disposing of this case.*

Appellant argues, at page 40 of his brief, that in arriving at its decision to dismiss the amended bill the Circuit Court of Appeals erred in considering any facts alleged in the answer; that it should have considered only the allegations of the amended bill. No such error was specifically assigned by appellant and this question is, therefore, not properly before this court.

In the instant case the Circuit Court of Appeals had before it the whole record consisting of the amended bill of complaint, the answers, the reply and certain affidavits. It was called upon to determine two questions: first, was appellant entitled to a preliminary mandatory injunction directing appellees to furnish him with the continuous quotations?; second, was appellee, the New York Cotton Exchange entitled to an injunction prohibiting appellant from receiving or using these same quotations? If it determined the latter question in favor of appellees, it must necessarily have passed upon the first question adversely to appellant, because it could not have decided that appellant should be enjoined from receiving the quotations except on the theory that he was not entitled to them. In determining appellee's right to an injunction the Circuit Court of Appeals had the right to examine the allegations of the answer and the supporting affidavits and had to determine on these whether appellant was entitled to receive the quotations. It seems anomalous to argue that the court could look to the answer in deter-

mining one motion for an injunction which necessarily decided the other motion and yet could not consider these same papers in denying appellant's motion and dismissing the bill. The record here does not present the simple case of a motion to dismiss on appellant's amended bill of complaint alone, but one in all its essential features like a case submitted on bill and answer where all the pleadings are before the court for its final disposition of the issues. If the Circuit Court of Appeals treated the case as one submitted on bill, answer and reply and appellant seeks to reverse its decision on the theory that it should not have so treated it, then he should have assigned this method of dealing with the case as error. But the record contains no such assignment of error.

Furthermore, this treatment of the case is shown to have been in accordance with the intent of the parties. After the Circuit Court of Appeals had rendered its decision and filed its opinion the parties entered into a stipulation, appearing at page 70 of the record, that certain affidavits in the record should have the force and effect of testimony in support of the counterclaims and that the Circuit Court of Appeals might direct the entry of such final judgment on these counterclaims as in its opinion should be rendered, without prejudice to appellant's right to appeal. This stipulation shows an agreement by the parties that the Circuit Court of Appeals should on the whole record determine whether appellees were entitled to a final injunction thus finally disposing of the claims set forth in the bill. The action of the parties, therefore amounted to an assent that the court should dispose of the case on the whole record as though finally submitted on bill, answer, reply and affidavits. In this view of the case appellant should not now be heard to argue that the Circuit Court of Appeals erred in considering the whole of the record before it in its final disposition of the case.

The purpose of the parties in making this stipulation was obviously to obtain a final judgment disposing of all the issues in the case so that an appeal could be taken at once to this court without waiting until after a trial of the issues arising on the counterclaim and another appeal therefrom to the Circuit Court of Appeals. Although appellant was willing that the Circuit Court of Appeals should render final judgment on the question whether appellee should have a final injunction against his using the quotations and that it should look to the whole record to determine this, yet he now argues that it should not look at the whole record in disposing of his claim to the quotations. We submit that, if the whole record was before the court for the purpose of determining finally appellee's right to prevent appellant from receiving the quotations, it was necessarily equally before the court in determining whether the appellant was entitled to receive them. This court should not permit appellant to assume now a position inconsistent with that taken by him in entering into this stipulation. If appellant's contention is sustained he might be entitled to a trial of his claim to receive the quotations, even, although this court should affirm the final judgment on the counterclaim which decides that he is not entitled to them.

Appellant refers to the opinion of the Circuit Court of Appeals to establish his contention that its dismissal of his amended bill is based on facts alleged in the answer, but we submit that the ground for such decision is not found only in the discussion of such facts but in the opinion as a whole. This opinion shows that the court decided that appellant's bill did not show any grounds for equitable relief and if it was correct in this view its decision should be affirmed.

(b) *The New York Cotton Exchange has no illegal monopoly of continuous quotations.*

Under the second group of assignments of error appellant contends that the Circuit Court of Appeals erred in holding that the New York Cotton Exchange has no monopoly of cotton quotations and in holding that it is not unlawful for it to withhold these quotations from persons engaged in interstate buying and selling of cotton. Appellant concedes that these quotations are the property of the New York Cotton Exchange and further concedes that as the owner of them it is under no legal duty to sell them to any particular person (see page 50 of his brief); but he claims that if it sells or gives these quotations to one it must give them to all. In support of this proposition he cites *Patten* v. *U. S.*, 226 U. S. 525 (1912). All that was held in this case, however, was that a corner in cotton to enhance the price was illegal. The Patten case does not hold that if Patten sold to some he must sell to all. Appellant cites no other authority in support of this proposition and he does not claim that the alleged monopoly or discrimination was for the purpose of fixing or maintaining prices. The property right of the Exchange in its quotations is similar to the property rights of a newspaper association in its news. The courts have uniformly held that the Associated Press, United Press and other news-gathering agencies do not have to give their news to non-members and that their property rights in their news are entitled to protection. The courts have also held that the property right of an exchange in quotations is entitled to protection and that it is not bound to sell to all because it sells to some. *Board of Trade* v. *Christie, supra; Matter of Renville, supra.* Even with respect to commodities other than news this court has held that there is no obligation to sell to all because of sales to some. *U. S.* v. *Colgate*, 250 U. S. 300; *Federal Trade*

Commission v. *Curtis Co.*, 260 U. S. 568. We have discussed this question more fully at page 22 of this brief.

(*c*) *The contract between the Exchange and the Telegraph Company was not a sale of the unrestricted right to distribute the continuous quotations but the creation of an agency for their limited distribution.*

Appellant, in support of his third group of assignments of error, at page 53 of his brief argues that the contract between the Exchange and the Telegraph Company was a sale of the continuous quotations and that, therefore, any restriction on their distribution was invalid. We have already discussed very fully in Point I of this brief the purpose and nature of this contract. We shall merely point out here some reasons why it should not be construed as a sale of an unrestricted right in the quotations. The subject matter of the contract is the distribution of the continuous quotations and other quotations, statistics and reports of the Exchange. There are no restrictions on the distribution of any except the continuous quotations. It is apparent that the primary purpose of the Exchange in making this contract was to provide for the distribution of its continuous quotations of transactions carried on in its Board Room among its members and among those who, it felt confident, would not misuse them or permit them to fall into the hands of others who might misuse them.

To guard against this danger the contract contains many provisions designed to keep the control of the distribution of these quotations in the hands of the Exchange. These provisions indicate clearly that neither party intended by this contract to sell or transfer to the Telegraph Company an absolute right in the quotations or an unrestricted title to them so that it could distribute them to any person without the approval of the Exchange.

The contract is printed in full at pages 23 to 34 of the Record and contains the following provisions which negative an intention to sell the quotations to the Telegraph Company:

The Telegraph Company is not permitted to serve the quotations to bucket shops or persons engaged in transactions along those lines; the duty of determining the nature of the business carried on by an applicant for the quotations is not imposed upon the Telegraph Company—the Exchange is made the sole judge of that; the Telegraph Company shall not distribute the quotations to any person until after the Exchange has approved his application (R., pp. 26-27); the Exchange owns the telegraph instruments and employs the operators over which and by whom the quotations are sent to the Telegraph Company (R., pp. 24-25); the Telegraph Company agrees to protect the wires over which the quotations are transmitted from tapping; the Exchange has the right to inspect the rooms of the Telegraph Company and its instruments to see if the quotations are properly protected (R., p. 25). The form of application to be signed by applicants for the quotations is set forth in the contract and provides for a limited use of the quotations only. The applicant agrees not to permit their use in bucket shops, to receive the quotations for his private use only, not to give them to his branch offices or correspondents without obtaining the approval of the Exchange, not to connect his office where the quotations are received by private wire with persons making contracts in cotton without approval of the Exchange, to permit the Exchange to inspect his office to observe the use he is making of the quotations, that the Telegraph Company may discontinue serving him with the quotations at any time, if directed by the Exchange to do so'' (R., pp. 27-29).

In the contract the Telegraph Company further agrees to use its best efforts to prevent persons not approved by the Exchange from receiving the quotations, to furnish

the Exchange with a list of all persons receiving them (R., p. 29). It also agrees that its right to serve the quotations to any person shall cease and determine if the Exchange notifies it to discontinue serving that person with the quotations. It also agrees that the Exchange may conduct the defense of any suit to obtain the quotations (R., p. 30).

All these provisions indicate that the parties to this contract did not intend by it to sell to the Telegraph Company the quotations so that it could resell them to all persons wishing to receive them. Such a construction would be manifestly contrary to the intention of the parties and would nullify many of the express provisions of the contract. The contract is clearly not a grant of an unlimited privilege to the Telegraph Company to distribute the quotations to all. The provisions to which we have referred indicate an intent to keep them under the control of the Exchange. In legal effect this is a contract by which the Telegraph Company agrees to transmit these quotations for the Exchange to persons designated by it and to receive its pay for performing this service from the recipient of the quotations.

The transaction is analogous to the sending of a telegram C. O. D. where the Telegraph Company acts as agent for the sender but collects the charge for transmission from the receiver. The added circumstance that the Telegraph Company finds the transmission of these messages so profitable to it that it pays the sender of the message an annual sum for the privilege of transmitting them and collecting from the receiver does not change the contract from one of agency to a sale, if that is not intended by the parties to it.

In *Matter of Renville*, 46 App. Div. (N. Y.) 37 (see same case quoted more fully at page 21 of this brief) the court construed a contract between the New York Stock Exchange and a telegraph company for the distribution of quotations as an agency contract.

We submit that to construe the contract in the case at bar as a contract of sale would be contrary to the intent of the parties to it as evidenced by its provisions.

(*d*) *Appellant is not entitled to the quotations because they are distributed by a Telegraph Company.*

Appellant argues at page 62 of his brief that a common carrier must serve all alike and that, since these quotations are distributed by a telegraph company, he is entitled to receive them. If we are correct in our contention that the Telegraph Company has not become the owner of the continuous quotations, but acts merely as agent in distributing them, then this argument of appellant falls to the ground. But even if the Telegraph Company had acquired a limited ownership in the quotations, it does not follow that it must give them to everyone. In *Donovan* v. *Penn. R. R. Co.*, 199 U. S., 279 (1906), it was held that a railroad was not obliged to allow all to use its depot as a cab stand because it gave that permission to one, nor was it compelled to permit all to travel on its trains for the purpose of soliciting business from incoming passengers because it granted that privilege to one. There are many activities in which a common carrier may engage which it is under no duty to perform for all. See cases cited at pages 31 to 33 of this brief.

Western Union Telegraph Company v. *Foster*, 224 Mass. 365, cited by appellant on page 63 of his brief, lends some support to his contention. That case decides that a public service commission, given by a local statute jurisdiction over a company engaged in the transmission of intelligence by electricity, may direct it to furnish such intelligence to all without discrimination. That may be the public policy of Massachusetts as laid down in its statutes and expressed by its courts, but this principle

was not followed by this court in *Board of Trade* v. *Christie, supra,* and it is also directly in conflict with *Matter of Renville, supra.*

POINT VI.

The decree of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

HENRY W. TAFT,
Solicitor for Appellee,
New York Cotton Exchange.

HENRY W. TAFT,
GEORGE COGGILL,
Of Counsel.

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WM. R. STANS

Supreme Court of the United States

OCTOBER TERM, 1925, No. 200

FRANK MOORE, President of The Odd-Lot Cotton Exchange of New York

Appellant

against

THE NEW YORK COTTON EXCHANGE, THE WESTERN UNION TELEGRAPH COMPANY and THE GOLD & STOCK TELEGRAPH COMPANY

Appellees

MEMORANDUM ON BEHALF OF THE APPELLEES THE WESTERN UNION TELEGRAPH COMPANY AND THE GOLD & STOCK TELEGRAPH COMPANY

FRANCIS R. STARK
Solicitor for Appellees
The Western Union Telegraph Company
and the Gold & Stock Telegraph Company

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The position of these appellees is, in all material respects, the same as that of the appellee the New York Cotton Exchange. The remarks in

the brief of counsel for the Cotton Exchange, however, that "Naturally, the only motive of the telegraph companies was profit, and the more customers, the more profit" (page 16) and that "The only person having a real interest in preventing the misuse of the quotations was the exchange" (page 18) should perhaps be supplemented by the following statement:

The Western Union and the Gold & Stock, willing and anxious though they are at all times to increase their business in every legitimate way, earnestly believe that the policy which is sought to be effectuated by the contract with the Cotton Exchange is in the highest degree desirable as a matter of general public interest. If the question were still an open one, which we have assumed that it is not since *Board of Trade* v. Christie Company, 198 U. S. 236, it is our view that a holding that this contract violates the law would be a serious misfortune, if not a calamity. While it might result immediately in a slightly increased revenue for these companies, in the long run we have found that our best interests do not diverge widely in large matters from the public interest, and we are no less anxious than the Cotton Exchange that these arrangements shall continue to be upheld. We regard the matter as of the greater importance because, under the authorities, it is not perhaps entirely clear that a telegraph company can discriminate between applicants when the telegraph company itself is the collector and owner of the news; and, as counsel for the Cotton Exchange have

well pointed out (page 29), a valid reason for denying an application may often exist and still be difficult to prove. That it might be necessary for a telegraph company collecting and owning the quotations to find the proof, and that no such necessity exists when the ownership remains in the Cotton Exchange, is the real reason for these contracts.

Respectfully submitted,

FRANCIS R. STARK,
Solicitor for Appellees
The Western Union Telegraph Company
and the Gold & Stock Telegraph Company.

SUPREME COURT OF THE UNITED STATES.

No. 200.—October Term, 1925.

Frank Moore, President of the Odd-Lot Cotton Exchange of New York, Appellant, *vs.* The New York Cotton Exchange, the Western Union Telegraph Co., and the Gold & Stock Telegraph Co.	Appeal from the United States Circuit Court of Appeals for the Second Circuit.

[April 12, 1926.]

Mr. Justice Sutherland delivered the opinion of the Court.

The Odd-Lot Cotton Exchange is an organization whose members make contracts for themselves and for customers for the future delivery of cotton in lots of not more than 100 nor less than 10 bales. The members of the New York Cotton Exchange, which is organized under a special act of the New York Legislature, c. 365, Laws 1871, p. 724, also make contracts for the purchase and sale of cotton for future delivery, either for themselves or for customers; such contracts being made only upon open *viva voce* bidding, between certain hours of the day and in the rooms of the exchange in New York City. Quotations of prices thus established are collected by the New York exchange, and, under the terms of a written agreement with that exchange, the Western Union company pays $27,500 annually for the privilege of receiving and distributing them throughout the United States, to such persons as the exchange approves. Applicants for such quotations must sign an application and agree not to use them in connection with a bucket shop or to give them out to other persons. The Gold & Stock Telegraph Company, a New York corporation and a subsidiary of, and controlled by, the Western Union, is engaged in disseminating quotations of cotton prices by means of ticker service, owned and operated by it, tickers being located in exchanges, brokerage houses and elsewhere in the several states. The Odd-Lot exchange made

application to the two telegraph companies for this service in the form required by the contract with the New York exchange. It was refused, the New York exchange having declined to give its consent to the installation on the ground, among others, that, after investigation, it had ascertained that the Odd-Lot had succeeded another exchange which had been convicted of conducting a bucket shop and that the Odd-Lot had in its membership many members of the convicted exchange and was organized as a cover to enable its members to engage in the same unlawful business.

Federal jurisdiction is invoked under the anti-trust laws of the United States. The bill avers that the contracts between members of the Odd-Lot are chiefly for producers of cotton and others located, resident and in business in other states than New York, and are made and effectuated by communications through the Western Union by wire; that such contracts concern and include deliveries of cotton from cotton-growing states to and into the State of New York, involving actual interstate shipment and transportation; that the New York exchange has a monopoly upon the receipt and dissemination of cotton price quotations, through which quotations and prices of cotton, both spot and for future delivery, are influenced, guided and fixed in the exchanges and markets throughout the United States; that the contract with the Western Union is in restraint of interstate trade and commerce in cotton and was entered into for the purpose of monopolizing and restraining that commerce. There is an attempt to allege unfair methods of competition, which may be put aside at once, since relief in such cases under the Trade Commission Act must be afforded in the first instance by the commission.

The prayer is for a decree cancelling the Western Union contract, adjudging the New York Cotton Exchange to be a monopoly, restraining appellees from refusing to install a ticker and furnish the Odd-Lot and its members, as they do others, with continuous cotton quotations, and for other relief.

The answer, in addition to denials and affirmative defensive matter, sets up a counterclaim to the effect that the Odd-Lot, though it had been refused permission to use the quotations of the New York exchange, was purloining them, or receiving them from some person who was purloining them, and giving them out to its members, who were distributing them to bucket shops, with the conse-

quent impairment of the value of appellees' property therein. An injunction against the continuance of this practice was asked.

Both parties moved for interlocutory injunctions. The district court denied appellant's motion and granted that of appellees. 291 Fed. 681. Upon appeal, both orders were affirmed by the court of appeals. 296 Fed. 61. By stipulation of the parties authorizing such action, the court of appeals remanded the cause with directions to the district court to enter a final decree dismissing the bill and making permanent the injunction granted appellees. Since this left to the district court only the ministerial duty of complying with the mandate, the decree below, for purposes of appeal, is final. *Gulf Refining Co.* v. *United States*, 269 U. S. 125, 136.

First. We are of opinion that upon the allegations of the bill no case is made under the federal anti-trust laws. The only possible ground on which the suit can be maintained rests in the claim that there is a violation of §§ 1 and 2 of the Sherman Anti-Trust Act, c. 647, 26 Stat. 209, for which appellant is entitled to sue under § 16 of the Clayton Act, c. 323, 38 Stat. 737. And whether this claim is tenable turns alone upon the effect of the contract between the New York exchange and the Western Union. Independent of that contract, there is no averment of fact in the bill upon which a violation of the Anti-Trust Act can be predicated. The New York exchange is engaged in a local business. Transactions between its members are purely local in their inception and in their execution. They consist of agreements made on the spot for the purchase and sale of cotton for future delivery, with a provision that such cotton must be represented by a warehouse receipt issued by a licensed warehouse in the Port of New York and be deliverable from such warehouse. Such agreements do not provide for, nor does it appear that they contemplate, the shipment of cotton from one state to another. If interstate shipments are actually made, it is not because of any contractual obligation to that effect; but it is a chance happening which cannot have the effect of converting these purely local agreements or the transactions to which they relate into subjects of interstate commerce. *Ware & Leland* v. *Mobile County*, 209 U. S. 405, 412-413. The most that can be said is that the agreements are likely to give rise to interstate shipments. This is not enough. *Engel* v. *O'Malley*, 219 U. S. 128, 139. See also *Hopkins* v. *United States*, 171 U. S. 578, 588, 590; *Anderson* v. *United States*, 171 U. S. 604, 615-616.

It is equally clear that the contract with the Western Union for the distribution of the quotations to such persons as the New York exchange shall approve does not fall within the reach of the Anti-Trust Act. Under that contract, the exchange at its own expense collects the quotations and delivers them to the telegraph company for distribution to such approved persons. The real distributor is the exchange; the telegraph company is an agency through which the distribution is made. In effect, the exchange hands over the quotations, as it might any other message, to the telegraph company for transmission, charges to be collected from the receivers. The payment which the telegraph company makes to the exchange is for the privilege of having the business. It does not alter the character of the service rendered.

In furnishing the quotations to one and refusing to furnish them to another, the exchange is but exercising the ordinary right of a private vendor of news or other property. As a common carrier of messages for hire, the telegraph company, of course, is bound to carry for all alike. But it cannot be required—indeed, it is not permitted—to deliver messages to others than those designated by the sender. We fully agree with what is said upon similar facts by Judge Ingraham in *Matter of Renville*, 46 App. Div. 37, 43-44:

"I cannot see that it makes any difference whether a despatch is given to a telegraph company to be communicated to a single individual, or to be communicated to ten, a hundred or a thousand individuals. Under this agreement between the stock exchange and the respondents, certain information is given to the telegraph company to be communicated to individuals or corporations designated by the stock exchange. Whether we call this information a special despatch or general information which the stock exchange desires to communicate, seems to me to be entirely immaterial. The fact that the telegraph company pays to the stock exchange a certain sum of money for the information which it receives to transmit is also immaterial. The substance is that those to whom this information is directed to be given by the stock exchange are willing to pay the stock exchange for such information, and are also willing to pay the telegraph company the expense of transmitting the information. The information delivered to the respondents for transmission is a communication which the stock exchange wishes to transmit to the persons it designates and to no one else. I can see no reason why the stock exchange should be required to furnish the appellant with this information, which relates solely to its own business upon its own property, or why the

respondents should be required to violate their agreement with the stock exchange and the law of this State, and furnish to the appellant information which had been communicated to the respondents by the stock exchange for a specific purpose and none other."

So far as the exchange is concerned, the evident purpose of the contract was to further and protect its business. The terms are entirely appropriate and legitimate to that end. The effect of the making and execution of the contract upon interstate trade or commerce, if any, is indirect and incidental. Neither in purpose nor effect does it directly or unreasonably restrain such commerce or operate to create a monopoly. It has long been settled by this court that under such circumstances a trader or manufacturer engaged in a purely private business may freely exercise his independent discretion in respect of the persons with whom he will deal and to whom he will sell and refuse to sell. Cases to this effect are cited in the opinion of the court below. It is unnecessary to repeat, or add to, those citations here. It is enough to refer to the decision of this court in *Board of Trade* v. *Christie Grain & Stock Co.*, 198 U. S. 236, 250, 252, where, in all essential particulars, the question now under review was presented and determined. There a suit was brought by the Board of Trade to enjoin the defendants from getting and distributing price quotations on sales of grain and provisions for future delivery. They were obtained in some way not disclosed, but not from either of the telegraph companies authorized by contract to distribute them, as the Western Union was authorized here. This court held that the collection of quotations belonged to the Board and was entitled to protection; that the Board did not lose its rights by communicating the information to others in confidential relations to it and under contract not to make it public; and that defendants should be enjoined. Holding the contracts with the telegraph companies not to be in conflict with the Anti-Trust Act, it was said (p. 252):

"But so far as these contracts limit the communication of what the plaintiff might have refrained from communicating to any one, there is no monopoly or attempt at monopoly, and no contract in restraint of trade, either under the statute or at common law. *Bement* v. *National Harrow Co.*, 186 U. S. 70; *Fowle* v. *Park*, 131 U. S. 88; *Elliman* v. *Carrington*, [1901] 2 Ch. 275. It is argued that the true purpose is to exclude all persons who do not deal

through members of the Board of Trade. Whether there is anything in the law to hinder these regulations being made with that intent we shall not consider, as we do not regard such a general scheme as shown by the contracts or proved. A scheme to exclude bucket shops is shown and proclaimed, no doubt — and the defendants, with their contention as to the plaintiff, call this an attempt at a monopoly in bucket shops. But it is simply a restraint on the acquisition for illegal purposes of the fruits of the plaintiff's work. *Central Stock & Grain Exchange* v. *Board of Trade*, 196 Illinois, 396. We are of opinion that the plaintiff is entitled to an injunction as prayed."

Second. The decree granting an injunction upon the counterclaim is challenged on the grounds, shortly stated: (1) that the court, having dismissed the bill for lack of jurisdictional facts, should have dismissed the counterclaim also, there being no independent basis of jurisdiction; (2) that the counterclaim does not arise out of any transaction which is the subject-matter of the suit; and (3) that the decree is not justified by the allegations of the counterclaim or the proof.

1. We do not understand that the dismissal was for the reason that there was an absence of jurisdiction to entertain the bill. What the court held was that the facts alleged were insufficient to establish a case under the Anti-Trust Act. Whether the objection that a bill of complaint does not state a case within the terms of a federal statute challenges the jurisdiction or goes only to the merits, is not always easy to determine. The question has been recently reviewed at some length by this court in *Binderup* v. *Pathe Exchange*, 263 U. S. 291, 305, and the distinction pointed out as follows:

"Jurisdiction is the power to decide a justiciable controversy, and includes questions of law as well as of fact. A complaint setting forth a substantial claim under a federal statute presents a case within the jurisdiction of the court as a federal court; and this jurisdiction cannot be made to stand or fall upon the way the court may chance to decide an issue as to the legal sufficiency of the facts alleged any more than upon the way it may decide as to the legal sufficiency of the facts proven. Its decision either way upon either question is predicated upon the existence of jurisdiction, not upon the absence of it. Jurisdiction, as distinguished from merits, is wanting only where the claim set forth in the complaint is so unsubstantial as to be frivolous or, in other words, is plainly without color of merit. (Citing cases.) In that event the

claim of federal right under the statute, is a mere pretence and, in effect, is no claim at all."

Here, facts are set forth in a serious attempt to justify the claim that the federal statute has been violated; and, while we hold them to be insufficient to sustain the claim, we are not prepared to say that they are so obviously insufficient as to cause it to be without color of merit and, in effect, no claim at all. We think there is enough in the bill to call for the exercise of the jurisdiction of a federal court to decide, upon the merits, the issue of the legal sufficiency of the allegations to make out the claim of federal right. This was evidently the view of the court below, and we construe its mandate as a direction to dismiss the bill on the merits and not for want of jurisdiction.

2. Equity rule 30 in part provides:

"The answer must state in short and simple form any counterclaim arising out of the transaction which is the subject matter of the suit, and may, without cross-bill, set up any set-off or counter-claim against the plaintiff which might be the subject of an independent suit in equity against him, and such set-off or counter-claim, so set up, shall have the same effect as a cross-suit, so as to enable the court to pronounce a final decree in the same suit on both the original and the cross-claims."

Two classes of counterclaims thus are provided for: (a) one "arising out of the transaction which is the subject matter of the suit," which must be pleaded, and (b) another "which might be the subject of an independent suit in equity" and which may be brought forward at the option of the defendant. We are of opinion that this counterclaim comes within the first branch of the rule; and we need not consider the point that, under the second branch, federal jurisdiction independent of the original bill must appear, as was held in *Cleveland Engineering Co.* v. *Galion D. M. Truck Co.*, 243 Fed. 405, 407.

The bill sets forth the contract with the Western Union and the refusal of the New York exchange to allow appellant to receive the continuous cotton quotations, and asks a mandatory injunction to compel appellees to furnish them. The answer admits the refusal and justifies it. The counterclaim sets up that, nevertheless, appellant is purloining or otherwise illegally obtaining them, and asks that this practice be enjoined. "Transaction" is a word of flexible meaning. It may comprehend a series of many occurrences,

depending not so much upon the immediateness of their connection as upon their logical relationship. The refusal to furnish the quotations is one of the links in the chain which constitutes the transaction upon which appellant here bases its cause of action. It is an important part of the transaction constituting the subject-matter of the counterclaim. It is the one circumstance without which neither party would have found it necessary to seek relief. Essential facts alleged by appellant enter into and constitute in part the cause of action set forth in the counterclaim. That they are not precisely identical, or that the counterclaim embraces additional allegations, as, for example, that appellant is unlawfuly getting the quotations, does not matter. To hold otherwise would be to rob this branch of the rule of all serviceable meaning, since the facts relied upon by the plaintiff rarely, if ever, are, in all particulars, the same as those constituting the defendant's counterclaim. Compare *The Xenia Branch Bank* v. *Lee*, 7 Abb. Pr. 372, 390-394. And see generally, *Cleveland Engineering Co.* v. *Galion D. M. Truck Co., supra,* p. 408; *Champion Spark Plug Co.* v. *Champion Ignition Co.,* 247 Fed. 200, 203-205.

So close is the connection between the case sought to be stated in the bill and that set up in the counterclaim, that it only needs the failure of the former to establish a foundation for the latter; but the relief afforded by the dismissal of the bill is not complete without an injunction restraining appellant from continuing to obtain by stealthy appropriation what the court had held it could not have by judicial compulsion.

3. Finally, the point is made that the court of appeals erred in directing the district court to enter a final decree making permanent the interlocutory injunction granted on the counterclaim because not warranted by the allegations or proof. Evidently for the purpose of facilitating an appeal to this court, appellant, by stipulation, consented that the affidavits filed in support of the preliminary application should be treated as testimony in support of the counterclaim and, on this, that the court of appeals might direct the entry of a final decree. The district court thought the pleadings and affidavits sufficient to warrant a preliminary injunction and the court of appeals thought them sufficient to sustain a decree making that injunction permanent. We see no reason to differ with their conclusions.

Decree affirmed.